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A Search for Justice: An Analysis of Purpose, Process and Stakeholder Practice at the International Criminal Court

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**A Search for Justice: An Analysis of Purpose, Process and Stakeholder Practice
at the International Criminal Court**

by

Benjamin Iain Nutt

A thesis submitted to Plymouth University in partial fulfilment for the degree

of

DOCTOR OF PHILOSOPHY

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Abstract

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Benjamin Iain Nutt

At the outset the International Criminal Court (ICC) was heralded as a revolution within international society, but it has since found itself at the centre of much controversy and debate. According to the *Rome Statute's Preamble*, a broad aim of the ICC is: "to guarantee lasting respect for and the enforcement of international justice". However, a review of the critical literature surrounding the ICC uncovered a noticeable lack of discussions applying theoretical understandings of justice to neither the Court's design nor operations; a gap in the literature that the thesis aims to address. Moreover, the review identified that the primary concerns regarding the ICC's performance all focussed on stakeholder practices. Combining these two observations, the thesis hypothesised that the controversies and issues facing the ICC emerged because the practice of the Court's primary stakeholders has been incompatible with the demands of justice. In order to test this hypothesis, the thesis analyses the compatibility of the ICC with what the thesis identifies as the core theoretical demands of justice across three areas: purpose, procedure, and stakeholder practice. It does this by building a theoretical framework from the justice literature which is then used to analyse and critique data relating to the ICC's purposes, procedures and stakeholder practices gathered from empirical observations, interviews, official documents and speeches. The thesis concludes that, for the most part, it is the practice of ICC stakeholders that have been incompatible with the demands of justice, not the Court's purposes or procedures.

Author's Declaration

At no time during the registration for the degree of Doctor of Philosophy has the author been registered for any other University award without prior agreement of the Graduate Sub-Committee.

Work submitted for this research degree at Plymouth University has not formed part of any other degree at Plymouth University or at another establishment.

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List of Abbreviations

AMICC	American Non-Governmental Coalition for the International Criminal Court
ASP	Assembly of States Parties
AU	African Union
CAR	Central African Republic
CICC	Coalition for the International Criminal Court
DRC	Democratic Republic of Congo
EAC	Extraordinary African Chambers
ECCC	Extraordinary Chambers in the Courts of Cambodia
EEAS	European External Action Service
ESRC	Economic and Social Research Council
EU	European Union
FCO	Foreign and Commonwealth Office
HRC	Human Rights Council
HRW	Human Rights Watch
IBA	International Bar Association
ICC	International Criminal Court
ICJ	International Court of Justice
ICTJ	International Centre of Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IGO	Inter-Governmental Organisation
ILC	International Law Commission
IMTFE	International Military Tribunal for the Far East
IMTN	International Military Tribunal Nuremberg
IPI	International Peace Institute
JCE	Joint Criminal Enterprise

MINUSCA	United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic
MINUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of Congo
MINUSMA	United Nations Multidimensional Integrated Stabilization Mission in Mali
NGO	Non-Governmental Organisation
NPWJ	No Peace Without Justice
OHCHR	Office of the United Nations High Commissioner for Human Rights
OTP	Office of the Prosecutor
PGA	Parliamentarians for Global Action
PSVI	Preventing Sexual Violence in Conflict Initiative
PTC	Pre-Trial Chamber
SCSL	Special Court for Sierra Leone
SRA	Social Research Association
STL	Special Tribunal for Lebanon
TFV	Trust Fund for Victims
TRC	Truth and Reconciliation Commission
UK	United Kingdom
UKRIO	United Kingdom Research Integrity Office
UN	United Nations
UNAMID	African Union/United Nations Hybrid Operation in Darfur
UNCHR	United Nations Commission on Human Rights
UNHCR	United Nations High Commission for Refugees
UNSMIL	United Nations Support Mission in Libya
US	United States
USA	United States of America
WTO	World Trade Organization

Chapter One

Introduction

1.1 Introduction

On 18 July 1998, the Campidoglio, Rome, played host to a celebration that many thought may never arrive. Following almost five weeks of fierce negotiations, 120 states voted in favour of adopting the *Treaty of the International Criminal Court, or Rome Statute*.¹ Commenting at the celebration, the then United Nations (UN) Secretary General, Kofi Annan, claimed that the creation of the International Criminal Court (ICC) would serve as: “a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law” (see 1998a). The ICC was coming.

On 2 July 2002, Annan’s “gift” was delivered when the ICC came into existence as a result of the required sixty ratifications of the *Rome Statute* being achieved. This new, permanent court was intended to become the focal point for the regime of international criminal justice which emerged with the creation of the International Military Tribunals for Nuremberg (IMTN) and the Far East (IMTFE) in the aftermath of the Second World War (see Sands, 2003).² Differing from the existing permanent international courts which concern the

¹ The results of the Rome Conference vote were: 120 in favour; 7 against; and 21 abstentions. However, only three, China, Israel, and the United States of America (USA), of the seven dissenting states have identified themselves. Thus, the identity of the four remaining opposing states remains debated, with the following ten states having all been recognised as possible candidates: Bahrain; India; Indonesia; Iraq; Libya; Qatar; Russia; Saudi Arabia; Sudan; and Yemen (see Schabas, 2011a: 21; Smith, 2010: 160; Scheffer and Cox, 2008: 990; Conso, 1999: 471-477; Lee, 1999: 25-26; Zwanenburg, 1999: 125; Scharf, 1998).

² The history of international criminal justice is a nuanced subject with many examples of prosecutions for acts that would now be categorised as crimes against humanity and war crimes being cited (see Goldstone and Smith, 2009; Cryer, 2005a: 9-72; McCormack, 1997), but none of these catalysed the development of international criminal law or justice like the post-Second World War international military tribunals (see Heller, 2017). However, prior to the creation of the International Criminal Court (ICC), the post-Nuremberg and Tokyo administration of international criminal justice was conducted on a limited, *ad hoc* basis via the internationally established: International Criminal Tribunal for the former Yugoslavia (ICTY) (1993-present); International Criminal Tribunal for Rwanda (ICTR) (1994-present); Special Court for Sierra Leone (SCSL) (2002-2013); Special Panels of the Dili District Court, East Timor (2000-2006); Extraordinary Chambers in the Courts of Cambodia

actions of states, such as the International Court of Justice (ICJ), the ICC's jurisdiction is over individuals alleged to have committed "the most serious crimes of international concern", identified as: genocide, crimes against humanity, war crimes and the crime of aggression (see ICC, 2011b: 2-3).³ Moreover, the last paragraph of the *Rome Statute's Preamble* alludes to the central goal of the ICC: "to guarantee lasting respect for and the enforcement of international justice" (see ICC, 2011b: 1).

Drawing on John Rawls' theoretical conceptions of justice (see Rawls, 2001; 1999a; 1999b; 1958), as well as those authors influenced by him (see Sen, 2009; Caney, 2005; Scanlon, 2003; Pogge, 2001; O'Neill, 2000; Barry, 1995; Beitz, 1975; Nozick, 1974), this thesis develops an original normative framework for analysing the ICC and international relations more broadly. The study explores three aspects of the ICC: purpose, procedure and stakeholder practice. Then, drawing on data collected from interviews, speeches, and ICC decisions, judgments and policies, it analyses the compatibility of the aforementioned aspects with the broader theoretical framework of justice offered. Using this original framework, the thesis provides new criticisms and explanations regarding the ICC's design, infrastructure and overall performance, which in turn helps to expand our understanding of the Court. Furthermore, by tackling these three distinct elements of the ICC, the research offers a

(ECCC) (2002-present); Special Tribunal for Lebanon (STL) (2009-present); and the Extraordinary African Chambers in the Senegalese Courts (EAC) (2013-present).

³ These four offences are often referred to as the "core crimes" (see Bassiouni, 2008a; Boister, 2003; Wirth, 2002). However, it is worth noting that, due to disagreements at the Rome Conference, the crime of aggression was initially left undefined. In fact, consensus on what constituted aggression, and who would determine it, was not reached until the 2010 Review Conference on the Rome Statute of the International Criminal Court held in Kampala, Uganda (see CICC, 2012).

balanced analysis of the Court, in contrast to much of the current body of literature which appears heavily polarised between support and opposition.⁴

1.2 The Problem and Research Approach

Initially, optimism and support for the ICC was high amongst a cross section of the international community, including: states, regional and international organisations, the international legal community and academic commentators.⁵ However, backing for the ICC was particularly prominent amongst global civil society actors (Glasius, 2006),⁶ especially humanitarian Non-Governmental Organisations (NGOs).⁷ For instance, Amnesty International called the establishment of the ICC: “a very important moment in the struggle for international justice, because it means that people suspected of committing crimes against humanity, war crimes or genocide – no matter what their rank – may be tried by the court” (see Amnesty, 2002: 1). Similarly, the International Committee of the Red Cross (ICRC) welcomed the ICC’s creation because it “reflects what is now an established international consensus that war crimes, crimes against humanity and genocide are of concern to all States, and to the international community as a whole” (see ICRC, 2002).

Nonetheless, the Court’s underwhelming performance and questionable practices led to the early optimism, surrounding what the ICC could achieve, being replaced by a growing sense of cynicism, disenchantment and scepticism. This development resulted in the emergence of a number of critical commentaries, both academic (see Bosco, 2013a; Hoile,

⁴ It should be noted that not all the ICC literature reflects this polarisation, just a sizeable portion of it. For instance, a good example of a balanced analysis of the ICC’s performance is Kirsten Ainley’s excellent article ‘The ICC on Trial’ (see 2011a).

⁵ The main arguments in favour of a permanent international criminal court are discussed in Section 1.3.

⁶ Marlies Glasius described the movement to establish a permanent international, criminal court as a “global civil society project” (see 2006: xiv).

⁷ William Pace and Mark Thieroff reported that 236 Non-Governmental Organisations (NGOs) attended the Rome Conference, nearly all of whom formed part of the Coalition for the International Criminal Court (CICC) (see 1999: 392).

2014a; Correll, 2013; Dicker, 2013a; Isanga, 2013; Posner, 2012; Ainley, 2011a; Kaye, 2011; Phooko, 2011; Roach, 2011) and journalistic (see Davenport, 2014; The New York Times, 2014; Chaulia, 2013; Spiegel, 2013; BBC News, 2012a; 2012b), dedicated to evaluating the ICC's intentions, mechanisms and operations.⁸ A noteworthy contribution, due to its uniquely balanced analysis, is Kirsten Ainley's 'The ICC on Trial' which offered a mixed review of the Court's performance and prospects (see 2011a). According to Ainley (see 2011a), the ICC can be considered an improvement on the *ad hoc* tribunals and has made strides in the effort to end impunity for international crimes but, at the same time, it remains vulnerable to political manipulation and the suggestion that it can help bring about peace as well as justice are unfounded. In short, the ICC's limited success and controversial actions formed the catalyst for a new body of literature which began to question the suitability of the Court as either; a medium for fairly and impartially adjudicating over violations of international criminal law or as a policy instrument for attaining desirable political ends.

However, upon reviewing this literature⁹ two common themes emerged. First, despite a plethora of literature dedicated to analysing, critiquing and understanding the workings and performance of the ICC, there is a noticeable absence of commentaries which attempt to apply theoretical conceptions of either justice (see Sandel, 2010; Sen, 2009; Miller, 1999; Barry, 1995; Lucas, 1980; Kamenka, 1979; Nozick, 1974; Rawls, 1971) or global justice (see Nagel, 2005; Held, 2003; Rawls, 1999a; Miller, 1995; Pogge, 1994; Walzer, 1983; Beitz, 1975) to either the Court's design or performance.¹⁰ This omission is somewhat surprising because,

⁸ The literature detailing the primary controversies relating to the ICC's performance and practices will be reviewed further in Chapter Two.

⁹ See Chapter Two.

¹⁰ For instance, Benjamin Schiff's (see 2008: 4-9) theoretical perspectives for his otherwise fantastic *Building the International Criminal Court* were realism, neoliberal institutionalism and social constructivism which ignored theories of justice, such as egalitarianism, libertarianism and utilitarianism, and global justice, including cosmopolitanism, particularism or social contractarianism. Fleeting references to the ICC were made throughout

as was outlined in Section 1.1, one of the ICC's central missions is to facilitate the advancement and enforcement of international justice. Moreover, there are many commentaries on the ICC, too many to even consider quantifying, which include the term justice in their title and/or claim to be evaluating the Court's ability to 'do justice' without attempting to outline what constitutes a just action or process. This practice is problematic because it appears to assume that notions of justice are commonly agreed upon and understood which, given the plethora of theoretical discussion surrounding the concept (see Wacks, 2012; Sandel, 2010; 2007; Kamenka and Alice, 1986: 212-232), is actually far from reality. Second, all the primary controversies concerning the ICC's performance, outlined by the literature, related to how international criminal justice had been pursued in practice; be that by the Court or by external stakeholders. This is important because it may suggest that the shortcomings experienced by the ICC have emerged not because its aims or legal framework is insufficient but instead as a result of the manner in which the Court's stakeholders have applied these to their broader search for international criminal justice.

Now, these two observations were influential with regards to shaping the design of the study and the direction of the research. This is because the thesis follows the classical approach and is intended to design a study which engaged with, and responded to, the rise in critical literature surrounding the ICC. According to Kenneth Bailey, some actors and concepts within social science are so complex that they have become increasingly difficult to observe and measure (see 2008: 53). The ICC is perhaps reflective of one of these complex

Thomas Nagel's *The Problem of Global Justice* (see 2005: 132, 136 and 145) but the analysis was in no way substantial nor focussed solely on the Court. Similarly, the commentaries of Richard Overy (see 2003: 29), Mark Lattimer and Philippe Sands (see 2003: 12-17), and Bruce Broomhall (see 2003: 126) include small yet excellent references to notions of equality, an essential component of justice (see Sen, 2009: 291-317; Lucas, 1980: 171-184), but fell short of incorporating this into a wider application of theoretical ideas surrounding either equality or justice.

actors that poses a challenge to analyse, which is possibly the reason why there are so many, often competing analyses of the Court. In relation to this thesis' discussion of the ICC, the study was initially designed in a way that somewhat resembles what Bailey termed the "classical approach" (2008: 53-54).¹¹ As described by Bailey, the classical approach to research design consists of three phases (see 2008: 53). The first phase involves identifying the main referents of the study, highlighting any initial observations and any underlying problems in need of engagement or investigation, and designing the research questions that will guide the study. The second phase involves devising a method, approach and/or framework to engage with the problems identified and to answer the research questions set. The final phase concerns itself with the gathering, analysis and presentation of data in a manner that provides an answer to the questions devised in the first stage and expands our understanding of the broader topic being studied.

With regards to the first stage, for this thesis, the main referents of the study are the ICC and the concept of justice. From the thesis' initial literature review three observations/problems were identified. First, that the ICC had become the subject of a growing level of critical literature and discourse that this thesis wanted to engage with and respond to. Second, that, despite the concept of justice being mentioned on numerous occasions in relation to the ICC and its operations, few if any analyses had attempted to apply theories of justice to the Court's design or work. Finally, that the primary controversies surrounding the ICC, as outlined within the academic literature, all related to issues of stakeholder practice. These observations/problems were then used to inform the initial design of the research project in two ways: on the one hand, this thesis seeks to address the

¹¹ It has been troubling finding other authors or discussions on this approach to social research design.

apparent justice gap identified as existing within the literature; and on the other hand, this thesis intends to examine whether or not all of the most concerning issues for the ICC relate to poor stakeholder practice or have broader purposive and/or procedural limitations also been influential. To achieve this, the analysis of this thesis is guided by the following research question: to what extent are the purposes, procedures and stakeholder practices surrounding the ICC compatible with theoretical notions of justice?

In order to answer this question, and moving on to the second stage of the classical approach, Chapter Three defined the concept of justice and developed some of its core principles into a normative framework through which the aforementioned elements of the ICC could be analysed. This normative framework draws on a Rawlsian conception of justice and acknowledges that justice is a multi-faceted, subjective concept but which generally relates to notions of right and wrong. This said, this thesis was able to identify three common elements covered within the literature on justice, society and institutions (social justice), formal processes (procedural justice), and decisions and/or actions, which form the basis of this thesis' analytical framework. These elements are then deconstructed and the framework is built by discussing justice's relationship with a range of concepts and principles within an ICC context. These appear in the following order, but it is important to note that this should not be interpreted as them being ranked in any form of priority or importance.

The first element of the framework concerns social justice and suggests that institutions, when embedded with justice, form the basis of fair¹² and functioning societies in two ways: first, by identifying the holders of rights and duties, and assigning them either

¹² John Rawls uses the terms fairness and justice interchangeably to relate to the same normative principle (see 1999b).

equally amongst all constituents or unequally but only if such an allocation best serves the interests of all; and second, by acting as a physical and normative coercive force helping to increase compliance with legal commitments and moral duties. The second element of the framework relates to procedural justice and outlines four models that can be used to measure if a procedure is just and thus suitable for purpose: the accuracy model, the process, within reason, produces the desired outcomes; the balancing model, the process represents a fair consideration of the costs and benefits of attaining said accuracy; the participation model, the process allows for stakeholders to participate in proceedings, if they so wish; and the transparency model, the process is clear in relation to how and why an outcome was reached.¹³ The final element is threefold and concerns the interrelationship, both conflictual and supporting, between the schools of thought relating to how decisions and/or actions can be considered just. One school of thought, termed here justice as outcome, defines justice in relation to the outcomes produced and predominantly concerns notions of desert and consistency. A second school of thought, termed here justice as process, defines justice in relation to the process used to produce outcomes and focuses on notions of impartiality and legal justice.¹⁴ The final school of thought, termed here justice as individual virtue, defines justice in terms of the personal characteristics held and displayed by the decision-maker.

Finally, and concerning the third stage of the classical approach, the data for this thesis was collected¹⁵ through semi-structured interviews, conducted either fact-to-face, via telephone or via video call depending on the respondents' availability and/or location. This

¹³ As will be suggested in Chapter Six, there may be occasions when the ICC's procedures fulfil some but not all of these criteria.

¹⁴ It should be noted that this form of justice differs from procedural justice insofar as the former concerns itself with actions whereas the latter processes.

¹⁵ The data collection methods are discussed further in Section 4.4.

interview data was then supplemented and supported by data gathered from speeches, ICC documents, judgements and reports, Non-Governmental Organisation (NGO) reports, and United Nations Security Council (UNSC) Resolutions and meeting transcripts. This data is then presented in three analytical chapters, each focussing on one of the specific areas of the ICC listed above, purpose, procedure and stakeholder practice, and each applying the normative framework of justice outlined in Chapter Three and summarised above. In short, this thesis argues that, for the most part, it is stakeholder practice, not the ICC's purposes or procedures, which have been incompatible with the theoretical demands of justice.

In sum, this Section has discussed how despite being initially greeted with much optimism, the ICC's questionable performance and practices have resulted in the emergence of some staunch criticisms of the Court. The discussion then outlined the normative framework and research approach of this thesis, the former of which draws on the work of Rawls. Analysing the ICC in accordance with this framework will help provide new theoretical understandings of the Court's design and operations as well as add depth to some of the existing criticisms that surround its existence and practice. Nonetheless, in order to contextualise this discussion as well as understand the ICC's creation, intentions and the challenges it faces, it is important to address some of the reasons why a permanent international criminal court was established in July 1998. In order to do this, the next section will outline the three primary arguments given in favour of establishing a permanent international criminal court.

1.3 Arguments in Favour of a Permanent International Criminal Court

There are many arguments offered which justify and/or support the creation of the ICC (see Cassese, 2009; Damaška, 2008; Bassiouni, 1999; UN, 1999), and in general they address two

broad questions: why do we need a formal regime of international criminal justice; and why is a permanent international criminal court required to administer it? However, for issues of time and space this thesis will focus on what it considers were the three core justifications for creating a permanent international criminal court: to buttress the punishment of international crimes, to develop and standardise international criminal law, and to establish a means for overcoming the problem of bad leaders within international society. In the interest of clarity, this thesis will categorise these arguments under three broad headings, ethical, legal and political, which are reflective of Steven Roach's depiction of the ICC as an organisation which sits at the point where the demands of international ethics, law and politics converge (see 2006). Moreover, dividing the arguments in this manner allows the author to highlight the different, and sometimes competing, rationales behind the establishment of a permanent international criminal court offered by commentators on: International Ethics, International Law, and International Relations. Finally, by setting out these arguments, this thesis intends to highlight the complex inter-relationship between notions of justice, law, punishment and power.

1.3.1 Ethical Argument in Favour of an International Criminal Court: to Ensure the Punishment of International Crimes

According to Hakan Seckinelgin and Hideaki Shinoda, the end of the Cold War and the subsequent "collapse of the bipolar system of international politics opened new dimensions of ethics in international relations" (2001: 1; see also Badiou, 2001; Frost, 1996: 1-10).¹⁶ This new structural environment brought about by the end of the Cold War has been said to have catalysed a normative shift within international society (see Ralph, 2009; 2007; Linklater,

¹⁶ Alain Badiou argued that following the end of the Cold War the "world was deeply plunged in ethical delirium" (2001: liiv).

1998). The nature of this shift was explained, in English School terms, by Jason Ralph who highlighted the possibility of a move away from a pluralist society underpinned by an “ethic of coexistence”, in which the rights of states were prioritised and a diversity in norms and values were accepted and recognised, towards a more solidarist society grounded on an “ethic of humanity”, where individual rights were the focus and, despite allowing move for cultural differences, there existed a certain number of universal norms and values (see Ralph, 2009: 134-138; see also Buzan, 2004: 45-62; Bull, 2000a; Wheeler and Dunne, 1996). The basis of this solidarist form of international society would be liberal and based on respect for universal human rights, the rule of law, and the principles of justice (see Birdsall, 2009: 18; Hurrell, 2005: 21; Buzan, 2004: 160; Bull, 2002: 230-232). Furthermore, accompanying these ethical developments was a redefinition of sovereignty away from the traditional, absolute conception of an inalienable right based on territorial independence and integrity (see Krasner, 1999: 6-12),¹⁷ towards one where independence was conditional on states upholding human rights obligations to their own citizens, a notion termed sovereignty as responsibility (see Deng, 2010; Bellamy, 2009; Pattison, 2008; Etzioni, 2006; Deng *et al*, 1996).¹⁸ Therefore, it could be argued that proposed creation of a permanent international criminal court was reflective of this normative shift as international society attempted to create a new set of institutions that could support and buttress their new approach.

Building on this depiction of an ethical revolt within international society, Anthony Lang (see 2008) highlighted that a new approach had emerged regarding how international relations were conducted. According to Lang, the growth of war crimes trials, economic

¹⁷ The traditional, absolute notion of sovereignty would be an amalgamation of Stephen Krasner’s four understandings of sovereignty: domestic, interdependence, international and Westphalian (1999).

¹⁸ In the literature sovereignty as responsibility may also be termed conditional sovereignty (see Frowe, 2011: 87-89; Matlary, 2006: 18-32; Slaughter, 2006: 2964; Coady, 2003: 281).

sanctions, interventions and counter-terrorism policies is indicative of the fact that in the post-Cold War era: “international society has become increasingly [more] punitive” (2008: 1). In other words, following the end of the Cold War punishing actors who had supposedly violated internationally recognised standards of behaviour was slowly re-emerging as a justification for international action.¹⁹ Moreover, it can be argued that a role for punishment at the international level was influential in the ICC’s creation. The basis for this argument relates to the determining relationship between impunity and punishment insofar as impunity arises when crimes are committed but are not effectively, if at all, investigated, prosecuted and punished (see UN, 2005b: 6).²⁰ In the context of international society, UN Secretary General, Ban Ki-Moon, affirmed the existence of a culture of impunity for international crimes when he concluded that: “far too often in the past the gravest crimes have gone unpunished” (see 2008). Adding weight to this argument, Nadia Bernaz and Rémy Prouvèze observed that less than one percent of the individuals responsible for war time atrocities, between 1945 and 2008, had been held to account (see 2010: 269). Thus, as alluded to by Kofi Annan in his opening remarks to the Rome Conference, at the heart of the attempts to establish a permanent international criminal court was an effort to help bring “an end to a global culture of impunity” for international crimes by ensuring that those most responsible for the offences were “not left unpunished” (see 1998b).²¹

¹⁹ Here, the author uses the term re-emerging because it should be noted that historically punishing wrongdoing was considered an *ad bellum* aspect of the just war theory (see Luban, 2011; see also Walzer, 2006: 62-63).

²⁰ The argument is based on the definition of impunity offered by the United Nations Commission on Human Rights (UNCHR) in their 2005 *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (see UN, 2005b: 6).

²¹ In fact, eradicating impunity for international crimes through punishment was mentioned as a justification for the ICC on 29 occasions by 27 separate delegations during the opening remarks of the Rome Conference (see UN, 2002a).

However, although there appeared to be much agreement that impunity for international crimes needed to be addressed by ensuring the perpetrators were punished (see Bellamy, 2011; Akhavan, 2001; Méndez, 2001; 1997), the question remains: why was punishing the offenders deemed the desirable response?²² A possible answer to this question can be provided by assessing some of the theoretical justifications for punishment in an ICC context. Within the literature, there are many justifications as to why crimes should be punished, with Cyndi Banks outlining seven: desert, deterrence, functionalism, incapacitation, rehabilitation, restoration, and retribution (see Banks, 2013: 114-134).²³ However, not all of these rationales are relevant to the arguments in favour of an international criminal court and as such this thesis will only expand on those directly related to the ICC issue: functionalism, deterrence and restoration. As a caveat, it should be noted that these theoretical positions on punishment were probably not overly prominent in the thought processes which surrounded the ICC's creation, but they do provide a useful philosophical backdrop to contextualise, explain and strengthen some of the more specific justifications supporting the creation of an international criminal court. The remainder of this section will be dedicated to further considering these three justifications and placing them within a broader context of the ICC's development.

First, the functionalist justification for punishment is a sociological approach developed by Emile Durkheim (see 1893;1984) which argues that punishing crimes is a beneficial social endeavour because it reinforces social solidarity and common values (see

²² Other potential responses to international crimes include non-penal mechanisms such as amnesties and truth commissions (see Robinson, 2003), but based on the abovementioned definition of impunity these non-penal mechanisms would not be suitable for addressing the problem of a culture of impunity described above.

²³ Robert Cryer *et al* discussed some of these justifications in the context of international criminal law and prosecution (see 2010: 22-39).

also Carlsmith, Darley and Robinson, 2002). Expanding on Durkheim's ideas, David Garland argued that the act of punishment "communicates meaning" about, amongst other things, notions of "morality" which can help to shape public opinion towards certain actions (see 1990: 252; see also Glasgow, 2015; Königs, 2013). According to Ralph, one new approach was the search for international criminal justice through the pursuit of individual criminal accountability for international crimes; a move defended by Ralph on the basis that the new solidarist order could be defended and maintained "by punishing individuals who violate its standards" (2009: 138; see also Higgins, 1995: 72).²⁴ Underpinning Ralph's claim, is the argument that punishing international crimes holds an "expressive" (see Drumbl, 2007: 173-176; Sloane, 2007) or "didactic" (see Damaška, 2008: 343-347) function of highlighting condemned actions, as well serving to increase obedience with international criminal law by the internalisation with international norms and values (see Koh, 1997; Franck, 1995; Kratochwil, 1989).²⁵

The second justification for punishment, deterrence, is the idea that punishing the perpetrators of crimes will help prevent their reoccurrence (see Banks, 2012: 117-119; Hudson, 2003: 18-26; Cohen, 1981: 75-77). Deterrence, one of the oldest rationales for punishing crimes, exists in two forms: general, deterring others from committing crimes, and individual or specific, preventing criminals from reoffending particularly the same offence (see Banks, 2012: 118; Hudson, 2003: 19; Cohen, 1981: 75-76). In fact, general deterrence even featured as a core justification behind punishment at the IMTN as suggested by the

²⁴ Rosalyn Higgins argued that the 1990s witnessed a proliferation in acceptance for individual criminal accountability for "universally condemned offences" such as genocide, crimes against humanity and war crimes (see 1995: 72).

²⁵ Recall the core argument of the Nuremberg Judgment was that: "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced" (see IMTN, 1947a: 223).

following excerpt from United States (US) Chief Prosecutor Robert Jackson's opening statement: "the wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated" (see IMTN, 1947b: 98-99). As such, unsurprisingly deterring future violations of international criminal law was a core rationale behind the creation of a permanent international criminal court for both academics and policymakers.

For example, Jonathan Charney advocated the establishment of an international criminal court on the grounds that: "its prosecutions will deter persons from committing international crimes in the future" (1999: 461; see also Akhavan, 2001: 9-13; Farer, 2000). Likewise, during the build up to the Rome Conference, the UN's Office of Legal Affairs (OLA) stated that: "effective deterrence is the primary objective of those working to establish the international criminal court" (as cited in UN, 1999). Finally, during the second reading of the International Criminal Court Bill in the United Kingdom's (UK's) House of Commons, the then Foreign Secretary, Robin Cook, argued that: "if the International Criminal Court deters just a single Pol Pot, it will have justified its creation" (see Hansard, 2001). However, as a caveat, it should be noted that not everyone shared the optimism that an international criminal court could deter future offences, with former US Under Secretary for Arms Control and International Security, John Bolton, labelling the proposed deterrent effect of an international criminal court as a "basic error" and a "cruel joke" because even the threat of military force had not prevented such atrocities (see US Department of State, 2002; see also Goldstone and Fritz, 2000: 659; Wippman, 1999).²⁶ Nonetheless, the sheer weight of references to

²⁶ Richard Goldstone and Nicole Fritz suggested that deterrence not be listed as an aim for an international criminal court because evidence suggests that international "tribunals cannot in themselves accomplish this" (Goldstone and Fritz, 2000).

deterrence in the literature and rhetoric surrounding the creation of a permanent international criminal court means that it should be listed as a core rationale behind punishing the perpetrators of international crimes.

The final justification for punishment, restoration, adopts the premise that punishment should address the needs of victims on an equal footing with those of the offender and wider society (see Braithwaite, 1998). In the context of the ICC, the idea that the justice process should serve the interests of the victims was a central theme during the negotiations on the Court's establishment. For instance, Anja Wiersing argued that: "prosecution of crimes and redress for victims lie at the heart of what the ICC was set up to do... deliver both retributive and restorative justice" (2012: 23). Similarly, again during his opening remarks to the Rome Conference, Annan outlined that "the overriding interest" of any agreed statute "must be that of the victims" (see 1998b). In fact, the idea that an international criminal court should act in the interest of victims and that victims should play a role in the justice process was mentioned on 131 separate occasions by 91 delegations during the opening remarks at the Rome Conference (see UN, 2002a). A driving force behind this new victim centred approach was that the *ad hoc* tribunals had focussed more on prosecutions than addressing victim needs (see Pakes, 2010: 177; Goetz, 2008: 65; Hirondele News Agency, 2007).²⁷ This said, in the context of international criminal justice a victim centred approach can prove challenging as a result of the victim-perpetrator dichotomy whereby it is possible for individuals to simultaneously be both victims and perpetrators of international crimes (see McAuliffe, 2013: 157; Akhavan, 2010: 113-115; Govier, 2008: 246-

²⁷ Marian Goetz argued that the victim centred ICC approach, including provisions for them to participate in proceedings, was designed to address the reality that: "victims and affected communities have often been peripheral or entirely excluded from justice processes in response to mass victims" (2008: 65).

248).²⁸ Nonetheless, as with deterrence, the numerous mentions in the literature and rhetoric to the ICC being victim centred as well as the decision to make provisions for victim participation in the *Rome Statute* (see McKay, 2008), it can be argued that serving the interests of victims was a justification behind the creation of a permanent international criminal court.

In short, a core rationale behind a permanent international criminal court given by ethicists and international criminologists was that it would help to bring an end to impunity for international crimes by ensuring that those responsible were punished. The argument in favour of building an international criminal court to punish those responsible for international crimes was further strengthened by incorporating the theoretical justifications for punishment into the broader discussion. Having outlined the primary ethical justification behind an international criminal court, as well as some by-products to it, the next Sub-Section will examine what this thesis believes was the core legal argument in favour of the ICC's creation: the development and standardisation of international criminal law. This is important because of the principle of *nulla poena sine lege*, no punishment without law, which determines that the institution of legal punishment both presupposes and requires a rule of law which clearly defines prohibited conduct and how it should be addressed (see Lacey, 1988: 79-80; Kleinig, 1973: 20; Rawls, 1955: 10).

²⁸ For instance, it is perceivable that child soldiers, despite being the victims of a war crime, could also be responsible for committing atrocities.

1.3.2 Legal Arguments in Favour of an International Criminal Court: the Development and Standardisation of International Criminal Law

Antonio Cassese, a prominent author in the Legal School, heralded the creation of the ICC as a “revolutionary institution” for the development of international criminal law because it challenged traditional conceptions of state sovereignty “by subjecting states’ nationals to an international criminal jurisdiction” and laid the foundations for “a truly international legal community” (1999: 145).²⁹ This claim was echoed by Chris Patten, former European Commissioner for External Affairs, who described the Court’s creation as: “the most important advance for international law since the establishment of the United Nations” (see EU, 2002). There were a number of legal arguments advocating the establishment of a permanent international criminal court, including the idea that international crimes demand international prosecution (see Cassese, 2009: 127; Terracino, 2007: 439) and that an international body is better suited to adjudicate over violations of international criminal law (see Cassese, 2009: 124-127). However, this thesis considers that the primary legal argument in favour of a permanent international criminal court was the belief that its creation would aid in the development and standardisation of the field of international criminal law. It was suggested that the ICC’s creation would impact on international criminal law in two ways: one relating to the Court’s establishment and the other based on its expected practice.

Concerning the first of these claims, prior to the creation of the ICC and the adoption of the *Rome Statute*, the field of international criminal law was said to be underpinned by severe ambiguities and deficiencies regarding three areas of its content: what constitutes an international crime; how international offences can be committed; and the process through

²⁹ See, the above discussion on sovereignty as responsibility in Section 1.3.1.

which adjudications over violations should take place (see Cassese, 1999; Pejic, 1998). This reality was perhaps a result of international criminal law's fragmented nature whereby it existed not as one or two core documents but as an amalgamation of customs, both *jus cogens* and *erga omnes* principles (see Bassiouni, 1996a), and jurisprudence from a number of different, sometimes competing, conventions, judgments, statutes and treaties.³⁰ Moreover, this situation was considered problematic for the search for international criminal justice because the absence of any specific rules and regulations allowed for subjective interpretation which possibly resulted in inconsistencies in both the application of international criminal law and the outcomes of international trials (see Cassese, 1999). Thus, as argued by Jelena Pejic, one of the main legal objectives of establishing a permanent international criminal court was to "clarify existing ambiguities in the law" (1998: 294). This, according to Cassese, could be, and in fact was, done by negotiating a treaty which: obviated the lack of universally recognised definitions of international crimes (see 1999: 146-153); detailed the core principles concerning the modes of liability (see 1999: 153-157); and established processes and regulations for overseeing all stages relating to the prosecution of international crimes (see 1999: 158-169; see also Pejic, 1998: 294).

With regards to the second part, the impacts stemming from the practice of an international criminal court, Kaye noted that: "the two [ad hoc] tribunals have significantly developed international criminal jurisprudence" through the emergence of case law

³⁰ The many conventions, judgments, statutes and treaties include: the 1954 *Draft Code of Offences against the Peace and Security of Mankind*, redrafted in 1996 (see UN, 1954; 1996); the 1899 and 1907 *Hague Conventions* (see Avalon Project, 2012); the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* (see UN, 1948a); the 1949 *Geneva Conventions* and 1977 *Additional Protocols* (see ICRC, 2012); the *Nuremberg Charter* (see IMTN, 1947a) and *Judgment* (see IMTN, 1947c), which were later given *de jure* recognition in the 1950 *Principles of International Law Recognized in the Charter of Nürnberg Tribunal and in the Judgment of the Tribunal* (see UN, 1950); as well as the Statutes (see UN, 2009a; 2010; SCSL, 2002; ECCC, 2004) and case law, Decisions, Judgments and Indictments, from the ICTY, ICTR, SCSL and ECCC.

stemming from their decisions (see 2011: 120; see also Swart, 2010; Danner, 2006; van den Herik, 2005; Boas and Schabas, 2003). Most notably, case law from the ICTY and ICTR has led to the formation of the Joint Criminal Enterprise (JCE) principle (see Biji, 2010; Powles, 2004) and the recognition of rape as an act of genocide (see MacKinnon, 2008; Russell-Brown, 2003). These observations are important for the development of international criminal law because, although the common law principle *stare decisis*, or binding judicial precedents, does not exist within international law (see Aksar, 2011: 39), international tribunals often base and defend their decisions in the context of previous judgments (see Guillaume, 2011; Miller, 2002). Thus, it was argued that if a permanent international criminal court could successfully complete trials then case law would emerge which, in turn, could help develop and strengthen the legal framework underpinning the prosecution of international crimes.

In short, a key rationale for a permanent international criminal court given by legal scholars was that it would help to develop and strengthen the field of international criminal law; a process that, if fulfilled, may help to standardise procedures and subsequently the outcomes of international prosecutions. In Cassese's words, the establishment and subsequent practice of an international criminal court, could help morph the field of international criminal law from "a body of law... [which was] rudimentary and fairly unsophisticated" into a fully functioning legal framework which could be applied consistently and fairly by a court of law (see 1999: 148).

Having reviewed the primary legal argument in favour of an international criminal court, we now turn to the core political rationale: a tool for international society to address the problem of bad leaders. This is useful for our discussion because it alludes to the convergence between law and politics within international society discussed above. Here, the

role of international criminal law, and subsequently an international criminal court designed to enforce it, can be said to be instrumental insofar as it is a means for the attainment of broader political goals (see Bergink, 2010; Kratochwil, 2009; Tamanaha, 2005; Koskeniemi, 2004: 484-489; Keohane, 1997).

1.3.3 Political Argument in Favour of an International Criminal Court: a Tool to Address the Problem of Bad Leaders

The instrumentalist explanation of international law has long been the dominant line of thought amongst policymakers, with Martti Koskeniemi highlighting a “predominance of the instrumentalist mindset in diplomacy and international politics” (2014: 40; see also Bederman, 2007).³¹ In the context of the search for international criminal justice, this instrumental vision of international law perhaps explains the regime’s proliferation in the aftermath of the Cold War because it was seen as conducive to buttressing the foreign policy objectives of the post-1991 American hegemonic order (see Mahony, 2015: 1074-1082; Krever, 2014: 70-73; Cerone, 2007: 288-290). This argument was clarified by Tor Krever who suggested that, despite emerging at the end of the Second World War, at the height of the Cold War the superpowers had no desire to support the creation of a formal regime of international criminal justice because they were often the culprits of “acts of aggression” (see 2014: 70). As such, Krever continued, “it was only with American victory in the Cold War that international criminal justice would remerge as a potent tool in the politics of the ‘new world order’” (2014: 70). Furthermore, instrumentalism was also at the heart of the arguments supporting the creation of a permanent international criminal court with Jamie Gaskarth noting that some of the ICC’s early advocates envisioned “a Court in instrumental terms, as a

³¹ David Bederman (see 2007) discussed the idea of ‘Foreign Office International Law’.

useful technical fix, and not as a significant challenge to existing norms” (2012: 442). Thus, given the proposed instrumental value that a permanent international criminal court would possess, it was considered to be as important a development in the international political landscape as the legal one (see Struett, 2008).

One of the core political arguments in favour of establishing a permanent international criminal court was that it could serve as a remedy for what Gaskarth described as a large cause of post-Cold War global instability: “the malign influence of certain individuals” (2012: 442). Following the end of the Cold War, the US led international community, often incarnated as the North Atlantic Treaty Organisation (NATO), became engaged in a number of conflicts with supposed pariah states accused of not governing in accordance with the basic humanitarian norms and values underpinning international society. However, as observed by Michael Struett, by the middle of the 1990s US policymakers became increasingly aware that they were embroiled in interstate conflicts “when the fundamental problem was with one or more leaders of a recalcitrant state... all of whom governed in ways that were corrupt, violent, and in violation of international law” (2008: 74), and who often incorporated systematic human rights abuses which often equated to international crimes as official state policy. Supporting this argument, Michael Brown noted that ethnic conflicts, one of the primary conditions in which international crimes are committed, are more often than not caused by “bad leaders” and/or “bad leadership” (see Brown, 2000: 16-23; Brown, 1996; see also Snyder, 2001: 45-88).³²

³² Michael Brown observed that over 80% of active conflicts in 1996 were triggered by instances of “bad leadership” (see 1996: 580-590). Moreover, Jack Snyder conducted a detailed, more holistic, study into the role of domestic leaders as the primary causes of ethnic conflict (see 2001: 45-88).

Therefore, because the causes of many armed conflicts were not pariah states *per se* but instead their power-wielding leaders, Struett argued that it is likely that the US “would have preferred to simply see a regime change and criminal prosecution of these particular individuals” as an alternative to military intervention; a reality only possible with the existence of a permanent international criminal court (2008: 74). This argument was echoed by Kenneth Anderson who posited that “international criminal law [in its current post-Cold War form] emerged partly because great powers saw it as an alternative to more forceful action in situations of massive human rights violations” (2009: 333).³³ Similarly, Kenneth Abbott suggested that a rationale behind the creation of the ICTY was that “the threat of prosecution was materially less costly than economic sanctions or military intervention” for the great powers (see 1999: 373-374). In short, it was believed that the creation of a permanent international criminal court could help counter the destabilising impact of bad leaders within international society, by removing them from power, criminally prosecuting them and replacing them with a more desirable alternative without having to resort to the use of military force.

1.3.4 Summary

From these discussions it is possible to see that a number of arguments existed in support of creating a permanent international criminal court. However, although these competing views shared a degree of optimism regarding the potential benefits of a permanent international criminal court,³⁴ the commonalities between the positions were not drawn and the

³³ However, Kenneth Anderson also raised doubts regarding the suitability of criminal trials as a replacement for military intervention on the basis that more often than not they prove ineffective when set in a context with no clear military victory (see 2009: 333-337; 1994: 291).

³⁴ This is not to say that there was universal support in favour of creating, or even the necessity for, a permanent international criminal, either before or after its creation (see Ralph, 2007; Jianping and Zhixiang, 2005; Ramanathan, 2005; Goldsmith, 2003; Casey, 2001; Bolton, 1999; Rubin, 1999; Cato Institute, 1998).

arguments remained polarised, which possibly resulted in the development of a plethora of expectations which were perhaps incompatible with one another. Observing this situation, Frédéric Mégret commented that: “the dense ideological environment in which the debates for and against international criminal justice [and the ICC] have been carried out... has contributed to a sort of normative swamp from which very few arguments emerge clear” (2001: 199).

In the context of this thesis, this discussion is important for two reasons. First, the arguments behind the ICC’s creation would have impacted on, and shaped, the Court’s design and processes which will be the subject of later analysis in Chapter Six. Furthermore, because the ICC was built on competing justifications identifying its purposes can be a difficult endeavour, a reality which will be explored in Chapter Five. Second, it is possible that these competing justifications have made the pursuit of international criminal justice a difficult endeavour and are in fact responsible for some of the critiques that have developed surrounding the ICC’s existence and/or practice on the basis that the Court has not quite lived up to expectations. A possible reason for this is that the ICC cannot satisfy the three primary supporting groups, ethicists, legalists and policymakers, all at once. For example, the ICC cannot act in an instrumental manner, promoting desired political outcomes, whilst meeting the demands of the ethicists and legalists that the law be applied equally to everyone.

However, it is here, by helping to reconcile these conflicted or polarised opinions on the role of the ICC, that the normative framework for this thesis becomes useful. This is because notions of justice do not demand that the ICC apply its legal rules universally against all violations, instead requiring two independent but interrelated realities. First, justice demands that decisions be made, or resources be distributed, in accordance with the

principles of desert and entitlement; subjective concepts that can be defined by the ICC itself and/or by its stakeholders. In other words, the ICC need not conduct proceedings against all violations of international criminal law because justice mandates that the actions, situations and/or individuals against whom the Court's proceedings take place are those which are entitled to be, as they fall within the Court's jurisdiction,³⁵ and those which deserve to be, because they meet the gravity requirements,³⁶ investigated and prosecuted. Second, justice depicts that decisions which are made, or actions which are taken, be done so in a consistent manner, to the extent that like situations are treated alike and unlike situations differently. Thus, in the context of the ICC, again the principle of justice as consistency demands that the Court need not investigate all instances of international crimes, just that the situations it does, or does not, open proceedings against are comparable to one another, particularly in terms of gravity.³⁷

Moreover, the normative justice framework can also help counter the concern relating to the use of the ICC, and international criminal law/justice more broadly, for instrumental purposes. This is because justice can be considered to be instrumental in nature, particularly with regards to its foundational roles within societies. For instance, justice is responsible for defining notions of right and wrong within a societal context and when linked to the institution of punishment it acts as a means for defining acceptable standards of behaviour.³⁸ Similarly, notions of justice possess an additional instrumental purpose with regards to how they ensure that a society's institutional arrangements are constructed in such a way that

³⁵ This can be in terms of the crimes committed or the broader complementarity criteria (See Sections 5.3 and 6.3).

³⁶ See Sections 5.3 and 6.4.

³⁷ A lack of consistency will be cited as a primary criticism of both the UNSC and Office of the Prosecutor's (OTP's) practice in Chapter Seven.

³⁸ See the functionalist role of punishment discussed in Section 1.3.1.

they result in mutual benefits for all constituents, but particularly the weakest members of a society or given transaction. This is important for an analysis of the ICC because it means that the onus of ensuring that the Court can be said to be acting in a manner compatible with the requirements of justice gets placed onto the stakeholders who make the initial decisions, be that the Office of the Prosecutor (OTP), states parties, or the UNSC.

1.4 Chapter Summary and Thesis Structure

The above Section introduced the main arguments in favour of establishing an international criminal court. These arguments viewed the idea and usefulness of a permanent international criminal court through differing lenses, a reality which continues to underpin the discussion on the ICC and may in part have resulted in a polarisation of the current literature. This thesis suggests that a normative framework based on theoretical conceptions of justice, such as the one outlined in Section 1.2 and in more detail in Chapter Three, can be useful for addressing this polarisation as it transcends and reconciles the conflicts posed by these different approaches.

This thesis will now proceed by reviewing the critical literature, both academic and journalistic, that surrounds the ICC and outline the seven primary controversies that have been levelled against the Court. Following this, Chapter Three discusses the theoretical conceptions of justice in more detail, giving this thesis' normative framework a grounding in the philosophical literature on justice as well as linking it to the workings of the ICC and the broader structure of international society. Chapter Four outlines the research methodology used by this thesis, explaining in more detail the approach used and the philosophical basis of the study. The Chapter also alludes to the methodological and research based challenges which arose during the study and how they were addressed.

The second section of the thesis is comprised of three analytical chapters, each focussing on an element of the ICC: purpose, procedure and stakeholder practice. Chapter Five analyses the purposive elements of the ICC in accordance with the thesis' normative framework. The Chapter focuses on two broad topics: the objective of the ICC as an organisation, and the aims of holding trials for international crimes before the Court. Chapter Six evaluates the procedural structure of the ICC. The Chapter discusses four processes, referrals, complementarity, gravity and cooperation, and seeks to explain the technical intricacies of their design, within a procedural justice context, as well as highlight any limitations that may currently exist. Lastly, Chapter Seven assesses the topic of stakeholder practices before the ICC. The Chapter focuses on four core ICC stakeholders, the OTP, Chief Prosecutor, states parties and the UNSC, and considers the extent to which their actions can be said to have been compatible with the demands of justice.

The final section acts as a conclusion and draws together the main arguments and themes from the thesis. The Chapter will assess the extent to which the hypothesis that the controversies and issues facing the ICC have emerged because the practice of the Court's primary stakeholders has been incompatible with the demands of justice to be correct or whether there are some broader issues relating to the ICC's purposes and procedural framework. It is hoped that this thesis will contribute: a more nuanced analysis of the ICC's design, workings and challenges; a new normative framework based on justice theory that can be applied to other aspects of the Court and perhaps other international organisations; and lay the foundations for some interdisciplinary collaboration with regards to the ICC and international criminal law/justice, particularly between ethicists, International Relations analysts, legal scholars and political theorists.

Chapter Two

The International Criminal Court Controversy

2.1 Introduction

As suggested in Section 1.2, the International Criminal Court's (ICC's) alleged poor performance and shortcomings led to the early optimism and support for the Court being replaced by a degree of cynicism, disenchantment and opposition. This reality is perhaps best illustrated by the negative titles given to some of the commentaries discussing the ICC's conduct which infer that the Court's performance has been unsatisfactory (see Hoile, 2014a; Chaulia, 2013; Kaye, 2011). The purpose of this Chapter is to review the critical literature surrounding the ICC and identify what this thesis considers to be the primary criticisms of the Court.

Now, as a caveat, also mentioned in Section 1.3.4, it is important to note that there were some commentators (see Goldsmith, 2003; Casey, 2001; Bolton, 1999; Rubin, 1999), institutions (see Cato Institute, 1998) and states (see Ralph, 2007; Jianping and Zhixiang, 2005; Ramanathan, 2005) that opposed the ICC from the outset. However, this Chapter is concerned with the controversies that have developed since the ICC became operational in 2002, not those prejudices which pre-dated the Court's creation. This thesis has identified seven independent controversies which serve to represent the mainstream critiques of the ICC's practice and/or structure. These seven controversies can be divided into two categories: institutional or internal, and political or external. The institutional controversies are those which relate to the apparent failings of the ICC as an organisation. Whereas, the political controversies relate to the possible shortcomings that have arisen as the result of influences external to the ICC and thus outside of its control. The remainder of the Chapter will be

dedicated to identifying and outlining these criticisms in more detail, starting with the institutional concerns.

2.2 Institutional Controversies Surrounding the International Criminal Court

One of the primary sources of criticism surrounding the ICC has been its own performance. At the heart of this criticism lies three central controversies: first, the internal management and/or leadership of former Chief Prosecutor Luis Moreno-Ocampo was argued as being poor and ineffective (see Hoile, 2014a: 115-143; Kaye, 2011); second, despite only being operational for fourteen years, during this time it has been suggested that the ICC has performed poorly (see Schabas, 2013: 546-547; 2012: 251-253; Posner, 2012); and finally, the ICC has been accused of selectivity in terms of situation selection, including an alleged bias against African states (see Dugard, 2013; Schabas, 2010a; Glasius, 2009; Jalloh, 2009). These controversies will now be discussed in further detail.

2.2.1 The Actions and Personality of Luis Moreno-Ocampo

As with any international organisation, the figureheads of the ICC, of which the Chief Prosecutor is one,³⁹ possess very important roles. The importance of the Chief Prosecutor's position was outlined prior to Luis Moreno-Ocampo's election by then United Nations (UN) Secretary General, Kofi Annan:

as we know from the experience of the International Tribunals for the Former Yugoslavia and Rwanda, the decisions and public statements of the Prosecutor will do more than anything else to establish the reputation of the Court, especially in the first phases of its work (see 2003).

³⁹ There are arguably three other International Criminal Court (ICC) figureheads: President of the Court, President of the Assembly of States Parties (ASP), and Registrar.

However, despite possessing seemingly high credentials in criminal law and prosecuting mass atrocity crimes, having served as Deputy Prosecutor during Argentina's *Junta Trials*, Moreno-Ocampo's performance as ICC Chief Prosecutor, from 2003-2012, has been subject to high-levels of criticism (see Hoile, 2014a: 115-143; Cole, 2012; Kaye, 2011; Rozenberg, 2011; 2008a; 2008b; 2008c; 2008d; Flint and de Waal, 2009; Peskin, 2009).

At a personal level, Moreno-Ocampo was described as a "disaster" by David Hoile (see 2014a: 117), a "megalomaniac" by Mark Gibney (see 2009), and an "egomaniac" by William Pace, Convenor of the Coalition for the International Criminal Court (CICC) (as cited in Inner City Press, 2009). Moreno-Ocampo was also accused of using his position as ICC Chief Prosecutor to pursue a broader "personal agenda" (as cited in The 4th Media, 2011) by seeking "publicity and attention at the expense of his legal duties" (Hoile, 2014a: 117). Finally, on 20 October 2006 an internal complaint was filed against Moreno-Ocampo by a member of the Office of the Prosecutor (OTP) for alleged sexual misconduct, including a severe rape allegation, against a South African journalist in March 2005 (see Inner City Press, 2006; see also Hoile, 2014a: 136-140; Flint and de Waal, 2009; Rozenberg, 2008b). However, placing these personal allegations aside, the academic literature and journalistic coverage highlight three broader concerns surrounding Moreno-Ocampo's performance and practice, which could suggest that his actions were not to the required standard.⁴⁰

First, Moreno-Ocampo was accused of being a poor manager and motivator, with Kaye stating that he employed a "management and decision-making style that has alienated subordinates and court officials alike" (2011: 119). Moreno-Ocampo was criticised for over

⁴⁰ The compatibility with notions of justice of some of Luis Moreno-Ocampo's specific actions will form the focus of Section 7.2.

emphasising the OTP's need for independence which divided the organisation (see Kaye, 2011: 123) as well as micromanaging proceedings (see Hoile, 2014a: 118; Kaye, 2011: 123; Flint and de Waal, 2009) which, according to Julie Flint and Alex de Waal, often left his investigators and prosecutors feeling "sidelined" and "insufficiently consulted" (see Flint and de Waal, 2009). Eventually however, as noted by Kaye, Moreno-Ocampo's managerial practices became problematic for the ICC because many of the "OTP's most experienced staffers quit" and "those who remain say that low morale continues to plague the court" (Kaye, 2011: 123; see also Flint and de Waal, 2009).⁴¹

Second, it can be argued that Moreno-Ocampo's abrasive personality distanced the ICC from potential sources of support, both from the global media and states, by virtue of the fact that he was often unnecessarily antagonistic, arrogant and/or confrontational. In addition to being antagonistic towards journalists, Moreno-Ocampo was accused of being "confrontational" to diplomats during his biannual briefings to the United Nations Security Council (UNSC) (see Peskin, 2009).⁴² Intended to allow the Chief Prosecutor to update the UNSC on developments and request assistance, Moreno-Ocampo often used the time to lambast the permanent members for inadequately supporting ICC investigations.⁴³ Moreover, on two occasions, 4 December 2009 (see UN, 2012a: 19) and 5 June 2012 (see UN, 2009b: 5), Moreno-Ocampo breached diplomatic protocol by accusing Sudanese representatives of purposively obstructing the ICC's investigation and even threatening to charge them as

⁴¹ According to Julie Flint and Alex de Waal, Luis Moreno-Ocampo's leadership style "squandered" some of the ICC's best assets, their high-quality lawyers and investigators (see Flint and de Waal, 2009). Elsewhere, the impact that leaders can have on staff morale within an international organisation was a theme of Catherine Weaver's analysis of Paul Wolfowitz, former World Trade Organization (WTO) President (see 2008).

⁴² These meetings occur twice a year for each situation referred to the ICC by the United Nations Security Council (UNSC).

⁴³ The issue of whether UNSC cooperation has been at the necessary levels will be discussed in Section 7.4.

accessories to the crimes.⁴⁴ Kevin Heller described Moreno-Ocampo's comments as "idle" and "ridiculous" (see 2012a), and they are, at best, examples of poor diplomatic practice. Actions such as these also pose a deeper problem because of the ICC's reliance on state cooperation to operate.⁴⁵

Finally, a number of Moreno-Ocampo's specific actions and decisions were questioned, particularly, but not solely, those during the trial of Thomas Lubanga. First, following an internal disagreement over case material in the build-up to Lubanga's trial in December 2008, Moreno-Ocampo chose to remove lead attorney Ekkehard Withopf from the case; a move criticised because Withopf was one of the OTP's most experienced and skilled prosecutors and it delayed the onset of Lubanga's trial whilst a replacement was found and briefed (see Flint and de Waal, 2009; Rozenberg, 2008e). Second, Moreno-Ocampo's decision-making with regards to the charges for Lubanga, child soldiering, was criticised because he failed to indict Lubanga for crimes against women and of a sexual nature, acts which were considered by most to have been some of the most heinous features of the conflict in the Democratic Republic of Congo (DRC) (see Smith, 2011; Flint and de Waal, 2009; Gambone, 2009). Third, the Lubanga trial was marred by constant issues of due process, mainly regarding disclosure of evidence, which Moreno-Ocampo should have prevented; again these procedural mishaps excessively extended the length of time it took to complete Lubanga's prosecution (see Hoile, 2014a: 129-134; Katzman, 2009; Stuart, 2008). Finally, unrelated to the Lubanga case, Moreno-Ocampo was criticised for making inaccurate declarations, most

⁴⁴ For instance, on 5 June 2012, Moreno-Ocampo stated that the Sudanese Ambassador Daffa-Alla Elhaq Ali Osman's "activities denying crimes in Darfur could be considered part of those crimes... The Office will therefore investigate if Mr Daffa-Alla Elhaq Ali Osman's denial of the crimes committed could be considered a contribution to a group of perpetrators acting with a common purpose" (see UN, 2012a: 19).

⁴⁵ See Sections 2.3.2 and 6.5.

notably declarations of guilt against suspects prior to trials being conducted, as seen within the Chief Prosecutor's own *op-ed* for The Guardian newspaper (see 2010), which violated the most basic legal principle of innocent until proven guilty (see Akande, 2010; Rozenberg, 2010; Schabas, 2010b).⁴⁶

To summarise, in an evaluation of Moreno-Ocampo's performance for The Guardian, Alison Cole somewhat kindly proposed that he "could do better" (2012). In contrast, David Hoile's assessment was less reserved, stating that: "Luis Moreno-Ocampo proved himself to be an arrogant, legally incompetent bully, lacking in integrity" (2014a: 118). As such, these commentators are perhaps suggesting that Moreno-Ocampo was not equipped with, or at least did not display, the necessary individual virtues required to excel as the ICC's Chief Prosecutor (see Gaskarth, 2012: 445-448; see also Hall, 2004); although it should be noted that no evaluation has applied a virtue justice framework to the actions of Moreno-Ocampo.⁴⁷ Having discussed the contentious mannerisms and practice of Moreno-Ocampo, we now turn our attention to the apparent poor overall performance of the ICC during its first 13 years.

2.2.2 The OTP's Poor Prosecutorial Performance

The second institutional controversy surrounding the ICC relates to the argument that the OTP has performed poorly in cases during its initial fourteen years of existence, a suggestion premised on three points. First, is the observation that, despite having opened 10 Full Investigations and indicted 41 individuals across 26 separate cases, the Court has only delivered five verdicts for the crimes listed under Article 5 of the *Rome Statute* (see ICC, 2011b: 3): four prosecutions, Thomas Lubanga Dyilo on 14 March 2014, Germain Katanga on

⁴⁶ Article 66(1) of the *Rome Statute* declares that: "everyone shall be presumed innocent until proved guilty before the Court" (see ICC, 2011b: 43).

⁴⁷ Jamie Gaskarth discusses virtue ethics in the context of the ICC's construction but not directly in relation to Luis Moreno-Ocampo's performance (see 2012).

7 March 2014, Jean-Pierre Bemba Gombo on 21 March 2016 and Ahmad al-Faqi al-Mahdi on 24 August 2016; and one acquittal, Mathieu Ngudjolo Chui, on 18 December 2012.⁴⁸ Second, aside from a remarkably low number of trials completed, the ICC has also seen eight defendants released not by virtue of them having been acquitted but because the Prosecution's case collapsed due to insufficient evidence: four at the Pre-Trial stage, Bahr Idriss Abu Garda on 8 February 2010, Callixte Mbarushimana on 16 December 2011, and Mohammed Hussein Ali and Henry Kosgey on 23 January 2012; and four at the Trial stage, Francis Muthaura on 11 March 2013, Uhuru Kenyatta on 5 December 2014, and William Ruto and Joshua Sang on 5 April 2016.⁴⁹ Finally, adding to the disenchantment of a low number of cases completed and the somewhat higher number of collapsed cases, concerns have also been raised regarding the length of ICC trial proceedings,⁵⁰ with William Schabas noting that: "no reasonable observer would use the adjective 'expeditious' to describe its [the ICC's] glacial pace" (2012: 252; see also Hoile, 2014a: 120-122; Aluoch, 2013: 445-447; IBA, 2012a).⁵¹

One way in which the ICC's performance can be measured is by comparing it with that of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunals for Rwanda (ICTR) (see Schabas, 2012: 251-253). This approach has been

⁴⁸ In fact, at the onset of writing for this thesis, the ICC has made zero prosecutions or acquittals. Additionally, there has been a further verdict delivered on 19 October 2016, which prosecuted five individuals, Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Fidèle Babala Wandu, Jean-Jacques Mangenda Kabongo and Narcisse Arido, for offences against the administration of justice in relation to the Bemba case (see ICC, 2016b). This distinction is not to detract from the value of these prosecutions, but instead to distinguish between those individuals prosecuted for crimes listed in the *Rome Statute* and those prosecuted for contempt of court offences.

⁴⁹ It should be noted that, cases collapsing due to insufficient evidence is not always problematic *per se* because it is possible that the evidence may not exist due to the accused not having committed the offence. However, at least three of the ICC's withdrawals, those against Uhuru Kenyatta, William Ruto and Joshua Sang, occurred because of poor prosecutorial performance.

⁵⁰ The average trial length at the ICC, from first appearance to judgment, is 75 months.

⁵¹ The length of trials was also a critique of the pursuit of international criminal justice before the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and Special Court for Sierra Leone (SCSL) (see Ford, 2014; Whiting, 2009; Wippman, 2006).

criticised by both Fatou Bensouda and Luis Moreno-Ocampo, during interviews with IPI Global Observatory (see IPI, 2011) and the International Bar Association (IBA) (see IBA, 2012b) respectively, who noted that the ICC is asked to operate in more challenging contexts, with a narrower mandate, and in accordance with more complicated procedures than the *ad hoc* tribunals. However, even if allowances are made for variances in context, mandate and procedures, the numerical differences between the ICC's performance and that of the ICTY and ICTR are quite staggering. Such an argument was outlined by William Schabas (see 2012: 251-253) who compared the first nine years of existence of the ICTY, ICTR and ICC. Moreover, as shown in Tables 2.1 and 2.2, the ICC's poor performance vis-à-vis the ICTY and ICTR has arguably continued when the comparison is extended to the first 13 years.

Table 2.1 shows that during the same initial 13 year time period the ICTY and ICTR made 161 and 90 indictments respectively whereas the ICC only made 39 which was 122 fewer or 75% less than the ICTY and 51 fewer or 56% less than the ICTR. Likewise, the ICTY and the ICTR delivered 48 and 34 verdicts respectively but the ICC has only managed six which is 42 fewer or 88% less than the ICTY and 28 fewer or 82% less than the ICTR. Finally, with regards to the withdrawal of indictments prior to the completion of a trial, and not for mitigating circumstances such as death or transfer to national jurisdiction, the ICTY withdrew 20 or 13% of their indictments, the ICTR 2 or 2.5% of their indictments, whereas the ICC cancelled 8 or 20.5% of their indictments.⁵² However, as shown by Table 2.2, it is arguably in relation to the length of trials where the disparity in performance between the ICTY, ICTR and ICC is most clear. Table 2.2 displays data and statistics from the first trials conducted by the

⁵² *Supra* note 49's qualification remains relevant here.

Table 2.1 - Table Showing Case Performance Figures for First 13 Years of ICTY, ICTR and ICC⁵³

Tribunal	ICTY (End of 2006)	ICTR (End of 2007)	ICC (End of 2016)
Number of Indictments	161	90	40
Number of Ongoing Proceedings	60	42	4
Number of Verdicts Delivered	48	34	6
Number of Verdicts Delivered (Including Appeals)	40	31	4
Number of Withdrawals	20	2	8
Number of Deaths	16	2	4
Number of Transfers	11	2	1
Number of Suspects At Large	6	8	14

(Sourced: ICTY, 2016b; ICTR, 2016; ICC, 2016b)

ICTY, that of Duško Tadić,⁵⁴ the ICTR, that of Jean-Paul Akayesu,⁵⁵ and the ICC, that of Thomas Lubanga Dyilo. Using these trials as points of reference, and by measuring the time from the accused's first appearance to the Judgment, it can be seen that the Lubanga trial, which lasted *circa* 72 months, was completed much slower than those of Tadić, *circa* 25 months, and Akayesu, *circa* 27 months. In fact, the presentation of evidence in the Lubanga trial took *circa* 28 months which was longer than both the Tadić and Akayesu trials lasted in their entirety. Moreover, the poor performance by the ICC with regards to the Lubanga trial is possibly exacerbated when it is noted that Lubanga's trial only dealt with an indictment listing three counts of war crimes, whereas, the Tadic and Akayesu trials had indictments which listed 34 and 15 counts respectively across different types of offences.

Thus, the large disparity between the performances of the ICTY, ICTR and the ICC, as shown in the above figures and trial statistics, can possibly be used to suggest that the Court has performed poorly during its initial 13 years of existence. The lack of trials conducted by

⁵³ Data correct as of August 2017.

⁵⁴ The Judgment in the case against Dražen Erdemović was delivered before that of Duško Tadić but this was because Erdemović's trial only took six months to complete because the accused entered a guilty plea (see ICTY, 2016c).

⁵⁵ Again, the Judgment against Jean Kambanda was delivered only two days after that of Jean-Paul Akayesu because Kambanda's trial only took four months as a result of his guilty plea (see TRIAL, 2016b).

Table 2.2 - Table Showing the Indictment Counts and Trial Length for First Trials Conducted by the ICTY, ICTR and ICC

Tribunal		ICTY	ICTR	ICC
Defendant in First Trial		Duško Tadić	Jean-Paul Akayesu	Thomas Lubanga Dyilo
Counts Listed in Indictment	Total	34	15	3
	Genocide	0	3	0
	Crimes against Humanity	12	7	0
	War Crimes	22	5	3
Date of First Appearance		26 April 1995	30 May 1996	20 March 2006
Length of Evidentiary Phase (In Months)		7	14	28
Date of Judgment		7 May 1997	2 September 1998	14 March 2012
Overall Trial Length (In Months)		25	27	72

(Sourced: ICC, 2016a; ICTY, 2016a; TRIAL, 2016a)

the ICC is arguably problematic for the Court's broader effectiveness because, as will be outlined in Chapter Four, one of the core purposes of international trials, including the ICC, is to adjudicate guilt or innocence, an objective which this thesis will argue can only be fairly achieved via criminal trials operating in accordance with the required levels of due process. Moreover, recalling the discussion from Section 1.3.1, it is only via the enforcement of individual criminal accountability through criminal trials that the rationales of punishing international crimes, such as ending impunity, deterring future offences and serving a didactic or expressive function, can be achieved. Likewise, both the development of international criminal law through the establishment of case law and addressing the problem caused by bad leaders, outlined as rationales for the ICC in Sections 1.3.2 and 1.3.3 respectively, will only be achievable if the Court is conducting regular and fair prosecutions. Finally, given the large amount of financial resources the ICC's members give to the ICC annually, the low number of verdicts delivered led to both the BBC (see 2012b) and Forbes (see 2014) publishing articles questioning the Court's value for money and suitability for purpose. Having outlined the institutional controversy of poor case performance by the ICC, discussion now moves to the issues of selectivity and an alleged African bias at before the Court.

2.2.3 Accusations of Selectivity and an Alleged African Bias

For students of international criminal law and justice, an accusation that the ICC has been selective would probably be unsurprising. This is because any overview of the history of international criminal justice would uncover that the issue of selectivity has been endemic within international trials and prosecutions of so-called international crimes, with accusations of limited application (see Damaška, 2008: 361-363; Drumbl, 2007: 151-154; Amann, 2002: 116), victors' justice (see Zolo, 2009; Bass, 2000: 8-16), and even the ICTY's anti-Serb bias (see Clark, 2014: 157-162; Obradovic-Wochnik, 2014), all present. In fact, overcoming the credibility and legitimacy deficit caused by the negative perceptions of selectivity was used by Kofi Annan to justify the creation of a permanent international criminal court: "only a permanent Court with universal jurisdiction can finally lay to rest the charge that the international community is being selective or applying double standards in deciding which crimes to investigate and punish" (Annan, 1999).

However, Annan's suggestion that the issue of selectivity can be overcome is somewhat unrealistic for three reasons. First, it is important to recognise that both practical and resource limitations make a complete removal of selectivity in the application of international criminal law (see Armenian, 2016; Cryer, 2005a) and/or interventions on humanitarian grounds (see Szende, 2012; Binder, 2009; Brown, 2003; Kritsiotis, 1998), more broadly, impossible. Second, as will be argued in Section 5.3 and Chapter Six, the ICC itself is mandated to be selective insofar as it has a situation and case selection criteria which defines where and when its jurisdiction is triggered. Finally, as will be highlighted in Section 3.4.1, questions of justice, that is what is the right action or distribution, are inherently selective insofar as they assess and resolve competing claims for desert, entitlement and/or resources by setting out a predetermined criteria. Thus, because in international relations selectivity

can be both right and wrong, it is not enough to merely ask if selectivity exists, instead questions concerning how and why selections are made must also be considered (see Brillmayer, 1995: 970).

As such, in the context of the ICC, the primary controversy concerning selectivity relates to the Court's almost exclusive focus on Africa.⁵⁶ The Africa/ICC relationship has been the subject of much coverage and discussion (see Kariuki, 2015; Hoile, 2014a: 199-218; Mbaku, 2014; Werle, Fernandez and Vormbaum, 2014; Bosco, 2013b; Du Plessis, Maluwa and O'Reilly, 2013; BBC News, 2012c; 2012d; Waddell and Clark, 2008).⁵⁷ Moreover, disagreements over the ICC's alleged unfair selection practice has resulted in African states agreeing not to cooperate with the Court's arrest warrant against Sudanese President, Omar al-Bashir (see BBC News, 2009), and discussing the possibility of a continent wide withdrawal (see The Guardian, 2016; Fortin, 2013), a move initiated in response to the Kenyan Parliament's withdrawal vote on 5 September 2013 (see BBC News, 2013a).⁵⁸ Underpinning the concerns of African states and the African Union (AU), are allegations that the ICC has pursued a selection policy based on an institutionalised African bias (see Dugard, 2013).⁵⁹ These apprehensions, regarding the ICC's apparent obsession with Africa, have been expressed by African statespeople. The Ethiopian Prime Minister, Hailemariam Desalegn, has

⁵⁶ In January 2016, the Office of the Prosecutor (OTP) opened its first Full Investigation into a situation outside of Africa, Georgia. However, the first nine Full Investigations were all in Africa: Democratic Republic of Congo (DRC) (2004), Uganda (2004), Darfur, Sudan (2005), Central African Republic I (CAR I) (2007), Kenya (2010), Libya (2011), Côte d'Ivoire (2011), Mali (2013), and CAR II (2014).

⁵⁷ In fact, Africa's turbulent relationship with the ICC has resulted in the creation of a Journal, *African Journal of International Criminal Justice*, in 2014 dedicated to discussing the issue.

⁵⁸ Developments on this issue both in Kenya and Africa more broadly have been limited and slow. In October 2013, the African Union (AU) states convened the Extraordinary Summit on the ICC with mass withdrawal on the agenda but, as noted in Solomon Dersso's review of proceedings, "not even a single member country declared withdrawal from ICC" (2013a). However, in February 2016, AU states backed Kenya's proposal for a withdrawal but no legal resolution was passed and the matter remains a subject for individual members (see The Guardian, 2016).

⁵⁹ As a caveat, not all African states share the mainstream animus position put forward by the AU, most notably Botswana have long continued to offer the ICC its support (see Njini, 2016; UN, 2015a; Clotney, 2013).

argued that: “African leaders have come to the consensus that the (ICC) process... has a flaw. The intention was to avoid any kind of impunity... but now the process has degenerated into some kind of race hunting” (as cited in Laing, 2013).⁶⁰

However, the ICC’s alleged African bias has been challenged by both the ICC and its supporters, including some African personalities, on three grounds. First, the ICC’s current Chief Prosecutor, Gambian Fatou Bensouda, has suggested that the calls of an African bias ignore the fact that the crimes investigated and prosecuted by the Court have been committed against Africans: “what offends me most when I hear criticisms about the so-called African bias is how quick we... forget the millions of anonymous people that suffer from these crimes... because all the victims are African victims” (as cited in Smith, 2012). Second, Desmond Tutu, the former Archbishop of Cape Town and head of South Africa’s Truth and Reconciliation Commission (TRC), has argued that African animosity towards the ICC is underpinned by an elite driven agenda from African leaders to protect themselves from the Court’s jurisdiction: “those leaders seeking to skirt the court are effectively looking for a license to kill, maim and oppress their own people without consequence” (2013; see also Nutt, 2015). Finally, Kofi Annan, the Ghanaian former UNSG, posited that the alleged African bias was grounded on misconceptions regarding how and why the situations were brought before the ICC: “in four of the cases on Africa... African leaders themselves made the referral to the ICC. In two others... it was the United Nations Security Council, and not the Court, which

⁶⁰ This concern has been echoed by the Presidents of South Africa and Zimbabwe, Jacob Zuma and Robert Mugabe respectively, with Zuma stating that “in the eyes of the African leaders, the ICC is biased” (as cited in Maclean, 2015) and Mugabe suggesting that the ICC “seems to only exist for alleged offenders of the developing world, the majority of them African” (see 2011: 3).

initiated proceedings... Let me stress that it is the culture of impunity and individuals who are on trial at the ICC, not Africa” (2013).⁶¹

However, arguments such as those above are perhaps problematic because, as argued by David Bosco, it gives the impression that the Court “has no agency” when in fact the OTP specifically chose to focus on situations in Africa at the expense of others including Afghanistan, Colombia, Iraq, and until only recently Georgia (see 2013c). Moreover, whether or not the ICC is biased against Africa is in part a moot discussion insofar as it is at the moment perceived to be anti-African by many in the continent at both the elite and grassroots level (see Fisher, 2013). This negative perception has greatly damaged the ICC’s credibility and legitimacy, with the Court being labelled as: a “neo-colonial project” (see Ainley, 2011a: 329), an “agent for postcolonial Western interests” (see Kaye, 2011: 125), and, in the words of Kenyan President Uhuru Kenyatta, a “toy of declining imperial powers” (as cited in BBC News, 2013b).⁶²

In fact, there are two reasons why questions concerning the fairness of the ICC selection process and practice are problematic for the Court’s effectiveness: first, as outlined by Mirjan Damaska, allegations of unfair selectivity, such as the African bias of the ICC, could deduce the “didactic” purpose of international criminal justice discussed in Section 1.3.1 (see 2008: 360-364); and second, Thomas Franck argued that if the rules underpinning international law are considered to be unfair in themselves or their application, then compliance with said regulations will be limited (see 1995). Thus, it can be argued that even though there is much debate surrounding whether or not the ICC is biased against Africa, the

⁶¹ The politicisation of the search for international criminal justice resulting from self and UNSC referrals will be discussed in Sections 2.3.3 and 2.3.4.

⁶² It should be noted that neither Kirsten Ainley nor David Kaye were themselves positing the ICC as “neo-colonial” or “postcolonial” but were merely acknowledging the existence of these arguments.

perception, amongst Africans, that it is means that it can and should be recognised as a core controversy facing the Court.

2.2.4 Summary

The observations outlined above are interesting for this thesis because they suggest that some of the ICC's failings may in fact be the fault of actions taken by the Court itself. Moreover, none of these controversies depends on the ICC's purpose or its procedural design, instead they concern how these purposes have been pursued by the Court or how the procedures have been followed in practice. Lastly, as was highlighted as the point of entry for this thesis in Section 1.2, none of the commentaries purporting these criticisms approached them through a framework of justice theory. This is somewhat surprising given that many of these analyses could have been enhanced, or at least better explained and understood, by using a framework similar to the one adopted by this thesis.

For instance, the discussions regarding Moreno-Ocampo's performance as Chief Prosecutor could have been furthered by linking the discussions and critiques to a broader virtue justice framework. There are many commentaries which highlight the alleged issues relating to Moreno-Ocampo's leadership style and/or actions but none of these attempted to build a theoretical model regarding the individual virtues expected to be held by the Chief Prosecutor, how they were expected to act, upon which Moreno-Ocampo's performance could be analysed. Such an approach would be useful because it would allow for a more rigorous evaluation of not only Moreno-Ocampo's performance but also future Chief Prosecutors.

Similarly, it is possible that the discussions regarding the concerns with the OTP's prosecutorial performance could be better understood within a framework that suggests how

actions and/or decisions can be considered just. Such a framework would help establish the many ways in which the actions and/or decisions of the OTP could be considered effective and correct. For example, of the three controversies raised in Section 2.2.2, one, the low number of completed cases, is a concern based on an outcome based understanding of justice, whereas, the other two, poor investigation and case building practice and the length of proceedings, are criticisms focused on a process based understanding of justice. Furthermore, by emphasising the demands relating to the way in which decisions are made alongside those concerning the outcomes produced, the limited number of completed cases, the troubled investigations and the length of trial proceedings could perhaps be better contextualised. In other words, a process/outcome framework would depict that the OTP's performance, as well as that of the ICC more broadly, not only be defined by the outcomes produced, namely the number of completed cases be that prosecutions or acquittals, but also the process through which these were delivered.

Finally, it can be argued that the selectivity controversy surrounding the ICC,⁶³ including the alleged 'African Bias', could in fact be better analysed by placing the discussion within a broader context of notions of distributive justice. As alluded to in Section 2.2.3, on its own selectivity cannot be considered a problem with regards to justice. This is because the very nature of justice is selective insofar as it involves making decisions about situations that hold competing claims of desert, entitlement and/or resources. Put another way, absent of a broader context of other decisions made or the vagaries of the decisions themselves, the apparent focus of ICC proceedings against Africa cannot be criticised. This is because there is a possibility that the African situations were chosen on the basis that they were more

⁶³ Even though the selectivity concern primarily relates to the selection practice of the OTP, it is often levelled at the ICC as a whole.

deserving of, and/or entitled to, ICC resources than others. Thus, it is not enough to simply accuse the ICC of selectivity, in order to understand the controversy further matters of how and why the Court has been selective need to be addressed as well as what this selectivity tells us about the intricacies of its decisionmaking practice. Here, facets of justice, such as issues relating to the consistency of decisions and the impartiality of decisionmaking, should be considered. Having outlined the institutional controversies surrounding the ICC, this Chapter will now turn its attention to those contentions that have arisen by virtue of actions and/or factors external to the Court.

2.3 Political Controversies Surrounding the International Criminal Court

The second set of controversies to be discussed by this thesis are those which have occurred as a result of factors outside of the ICC's direct control as well as the practice of actors external to the Court, namely states and the UNSC. For this thesis there are four central political or external controversies facing the ICC. First, it has been suggested that because the ICC does not hold universal, or at least near to universal, membership its ability to act as a truly global actor and pursue justice for all is hampered (see Tejan-Cole, 2016a; Whiting and Chen, 2016; Kaye, 2011: 119). Second, the developments that the Court could have made in some situations, particularly those in Uganda and Darfur, have been severely hampered by the somewhat *laissez faire* approach to arrest and surrender cooperation employed by some states (see Dłubak, 2012; Barnes, 2011; Sluiter, 2003). Third, concerns have been raised regarding the relationship between the ICC and the UNSC, and the extent to which the latter's practice may have resulted in a politicisation of the justice being administered by the ICC (see Olugbuo, 2014; Kaye *et al*, 2013; Kramer and Killeen, 2012; Mistry and Verduzco, 2012; White and Cryer, 2009). Finally, majority of the early work of the ICC was triggered via self-referrals but, as with the UNSC actions, this practice has been criticised for allowing political

considerations to influence the work of the Court (Akande, 2011; Akhavan, 2011; 2010; Robinson, 2011; Müller and Stegmiller, 2010; Kress, 2004). These political or external controversies will now be discussed in further detail below.

2.3.1 Universality and the Vagaries of the International Criminal Court's Membership

Absent of UNSC referrals,⁶⁴ the ICC's jurisdiction is not universal but instead limited to crimes committed either on the territory or by nationals of a state that has ratified the *Rome Statute* (see ICC, 2011b: 10).⁶⁵ This limitation, when paired with the realities of the ICC's membership, led some commentators, notably Abdul Tejan-Cole, to assert that: "the ICC lacks [the] universal jurisdiction[required] to make it a truly global institution" (2016a: 367). Likewise, this issue was reiterated by the ICC's President, Silvia Fernandez de Gurmendi, during her remarks at the opening of the Court's permanent premises on 19 April 2016, when she acknowledged that: "the Court has a global mandate but has not yet attained universal participation" (2016: 4). Central to this controversy is the observation that the four states with the largest populations, China, India, the US and Indonesia, along with other populous states, such as Pakistan, Russia, Ethiopia and Vietnam, all remain absent from the ICC (see CIA World Factbook, 2016; ICC, 2016c).⁶⁶ This means, as depicted by Table 2.3, that despite the ICC state parties representing 124, or 63%, of the possible 197 signatories, the identity of the absent states mean that the Court's jurisdiction only covers about 34% of the world's population.

⁶⁴ The contentious UNSC/ICC relationship will be discussed later in the Sub-Section. Similarly, the process of UNSC referral and the broader practice of the Security Council will be addressed in Chapters Five and Six respectively.

⁶⁵ The criteria for the exercise of the ICC's jurisdiction is outlined in Article 12 of the *Rome Statute* (see ICC, 2011b: 10).

⁶⁶ In fact, 12 of the top 20 states with the largest populations are not ICC states parties (see CIA World Factbook, 2016; ICC, 2016c).

Table 2.3 - Table Showing 2017 ICC Membership and Global Population Statistics⁶⁷

Total Possible State Parties	197
Number of States Under ICC's Jurisdiction	124
Percentage of States Under ICC's Jurisdiction	63%
Number of States Not Under ICC's Jurisdiction	73
Percentage of States Not Under ICC's Jurisdiction	37%
Total Global Population	7,256,490,011
Total Population Under ICC's Jurisdiction	2,471,011,003
Percentage of Global Population Under ICC's Jurisdiction	34%
Total Population Not Under ICC's Jurisdiction	4,785,479,008
Percentage of Global Population Not Under ICC's Jurisdiction	66%

(Sourced: CIA World Factbook, 2016; ICC, 2016c)

For the ICC, this lack of universality is problematic for two reasons. First, because the ICC's jurisdiction is over individuals from states parties, not the states themselves,⁶⁸ the aforementioned membership realities mean that, in its current guise, *circa* 66% of the world's population currently reside outside of its jurisdiction. As such, the ICC's reach only covers roughly 34% of the global population, a reality which may severely hinder the Court's ability to achieve justice for all and/or end impunity for international crimes. Second, the identity of those states absent and the statutory limits on the ICC's jurisdiction outlined above, have proved obstructive to the Court insofar as it has not possessed jurisdiction over many of the most violent conflicts in recent years, such as Iraq (see Iraq Body Count, 2016)⁶⁹, South Sudan (see UN, 2015c; 2014b), Sri Lanka (see UN, 2011b; International Crisis Group, 2010) or Syria (see ICRC, 2016), or those situations where heinous, systematic human rights violations are reportedly state policy, such as Eritrea (see UN, 2015d), Myanmar (see Amnesty, 2008a), North Korea (see UN, 2014c) or Zimbabwe (see HRW, 2008a). This is of concern because it means that in some situations the practice of the ICC becomes tied to, or even determined

⁶⁷ Data correct as of August 2017.

⁶⁸ As outlined in Section 1.1.

⁶⁹ The ICC does hold jurisdiction over the actions of the UK in Iraq but none of the other protagonists. Also, the ICC cannot act on alleged crimes committed recently by the so-called Islamic State (see UN, 2015b).

by, the vagaries of UNSC politics and global power structures, a reality which can lead to allegations of politicisation such as those which will be discussed below.

In light of these problems, it could be suggested that the ICC's effectiveness will remain curtailed until such a time when the *Rome Statute* holds almost universal jurisdiction or, at a minimum, the Court has automatic jurisdiction over a majority of the world's population.⁷⁰ This requirement was recognised early in the ICC's existence by the Court's first President, Philippe Kirsch, when in 2003, during a strategy meeting with Parliamentarians for Global Action (PGA), he argued that: "the ICC must aim for universality in order to main global justice" (see 2003). Similarly, de Gurmendi, again during her remarks during the opening ceremony of the ICC's permanent premises, stated that: "to be successful... it [the ICC] needs the determination of the global community to make accountability... a non-negotiable objective", a goal she claimed can be achieved by encouraging more states to sign and ratify the *Rome Statute* (see 2016: 4). In other words, for both Kirsch and de Gurmendi, the ICC's effectiveness is tied to whether or not the *Rome Statute* can attain the status of customary international law, a process that will be buttressed by increasing the number of states who willingly subject themselves to the Court's jurisdiction (see Gaskarth and Nutt, 2013).⁷¹ Thus,

⁷⁰ Here, the term almost universal jurisdiction is used because full universality is possibly unrealistic on the basis that no international treaty has been ratified by all 197 possible parties. The closest to full universality are the five treaties that have been ratified by 196 parties: 1949 *Geneva Conventions*, 1985 *Vienna Convention for the Protection of the Ozone Layer*, 1987 *Montreal Protocol*, 1989 *Convention on the Rights of the Child*, and 1992 *UN Framework Convention on Climate Change*. Likewise, in the context of international criminal law, the 1992 *Chemical Weapons Convention* has 192 ratifications, the 2000 *UN Convention against Transnational Organized Crime* 186, the 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 159, and the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* 147.

⁷¹ In fact, this line of thinking may explain the concerted effort from the ICC and its supporters to develop provisions to help address the universality limitation of the Court. On 1 December 2006, during the Fifth Annual ASP Session, state parties to the ICC adopted the *Plan of Action of the Assembly of States Parties for Achieving Universality and Full Implementation of the Rome Statute of the International Criminal Court* (see ICC, 2006a). Likewise, the ICC's supporters from global civil society, such as Amnesty International (see 2007), the Coalition for the International Criminal Court (CICC) (see 2016) and Parliamentarians for Global Action (PGA) (see 2016), have all established campaigns dedicated to encouraging states to ratify the *Rome Statute*.

it can be argued that in the absence of a broad, geographically dispersed membership, the ICC will struggle to exert the global influence desired by its supporters. Having discussed the controversies linked to the ICC's lack of universality, this thesis now turns its attention to the issue of outstanding arrest warrants and their impact on the Court's effectiveness.

2.3.2 Arrest and Surrender Cooperation

From Table 2.4, it can be seen that at the time writing began on this thesis 60% of the arrest warrants were outstanding. This figure had been relatively stable for the previous three years and grew to 67% for 2012. More recently, that is to say since 2013, the percentage of arrest warrants outstanding has decreased and remained constant at *circa* 40%. However, this still means that almost half of those indicted by the ICC remain fugitives to the Court's justice mechanisms. Furthermore, it is important to note that the list of fugitives continues to house some of the ICC's more high-profile indictees, including Lord's Resistance Army (LRA) leader Joseph Kony, Sudanese President Omar al-Bashir and Muammar Gaddafi's son Saif al-Islam.⁷²

This apparent arrest warrant deficit at the ICC has been the subject of much discussion (see Jamshidi, 2013; Dłubak, 2012; Wald, 2012; Barnes, 2011). Quite often the root of the problem is explained as stemming from what Gwen Barnes termed the ICC's "ineffective enforcement mechanism" whereby the ICC lacks an independent enforcement capability, such as an international police force, and as such relies solely on state cooperation to action its arrest warrants (see 2011: 1587; see also Mutyaba, 2012: 937; Wald, 2012: 230; Sluiter, 2003: 605; Oosterveld, Perry and McManus, 2001: 767).⁷³ Now, in an attempt to address this enforcement limitation, Article 86 of the *Rome Statute* establishes a legal obligation to

⁷² The politics surrounding the failure to arrest and surrender Omar al-Bashir will be critiqued in Section 7.3.2.

⁷³ The process of cooperation before the ICC will be discussed in more detail in Section 6.5.

Table 2.4 - Table Showing Details and Statuses of ICC Arrest Warrants per Year⁷⁴

Year	Indictments Made (Cumulative Total)	Arrest Warrants Issued (Cumulative Total)	Arrest Warrants Actioned/Cancelled	Arrest Warrants Outstanding (Percentage)
2002	0(0)	0	0	0(0%)
2003	0(0)	0	0	0(0%)
2004	0(0)	0	0	0(0%)
2005	5(5)	5(5)	0	5(100%)
2006	2(7)	2(7)	2	5(71%)
2007	4(11)	4(11)	1	8(73%)
2008	1(12)	1(12)	2	7(58%)
2009	4(16)	1(13)	0	8(62%)
2010	1(17)	2(15)	0	10(67%)
2011	11(28)	5(20)	2	12(60%)
2012	3(31)	4(24)	0	16(67%)
2013	6(37)	6(30)	5	14(47%)
2014	0(37)	1(31)	1	14(45%)
2015	3(40)	3(34)	2	15(44%)
2016	0(40)	0(34)	0	15 (44%)
Totals	40	34	15	15(44%)

(Sourced: ICC, 2016b)

cooperate with, and enforce, the ICC's requests (see ICC, 2011b: 55; see also Oosterveld, Perry and McManus, 2001: 769-775)⁷⁵ but this obligation only extends as far as ICC states parties (see Sluiter, 2003: 609-610)⁷⁶ and the Court does not possess a means through which to sanction instances of non-compliance (see Dłubak, 2012: 227-229; Phooko, 2011: 195-199). Furthermore, as will be detailed in Section 7.3, evidence would suggest that state parties have not always been willing to consistently uphold this obligation (see Dłubak, 2012: 229-230), a reality which has led some authors to suggest that the ICC will be ineffective in the search for international criminal justice (see Dłubak, 2012; Wald, 2012; Barnes, 2011; Phooko, 2011). However, Rita Mutyaba argued that given the reliance of the Court on cooperation, and the

⁷⁴ The figures here differ with those in Table 2.1 because Omar al-Bashir is the subject of two separate ICC arrest warrants. Data correct as of January 2017.

⁷⁵ Central to international law is the principle of *pacta sunt servanda*, outlined in Article 26 of the *Vienna Convention on the Law of Treaties*, which depicts that parties should not defeat the purpose of the treaty and abide by it in good faith (see UN, 1969: 11).

⁷⁶ This is based on an application of the principle of *pacta tertiis nec nocent nec prosunt*, outlined in Article 34 of the *Vienna Convention on the Law of Treaties*, whereby a treaty is only binding on parties that have accepted its content (see UN, 1969: 13).

many reasons that a state may have for not cooperating, the fact that the ICC has secured the arrest and surrender of any suspects should be viewed as a success (see 2012). Moreover, it should be noted that the ICC is not the first international tribunal to suffer an enforcement gap, particularly in the area of arrest and surrender, with the ICTY and, to a lesser extent, the ICTR all facing similar challenges (see Mutyaba, 2012: 941-943; see also Ryngaert, 2012; Wald, 2012; Nsereko, 2009; Knoops, 2002).

Nonetheless, outstanding arrest warrants, and the apparent lack of cooperation which causes them, remains an area of controversy surrounding the ICC's performance for two reasons. On the one hand, all the arguments in favour of an international criminal court and the benefits it could bring, outlined in Section 1.2, are intrinsically linked to the ICC's ability to conduct trials, events which cannot occur without access to suspects.⁷⁷ Such an argument, relating to the importance of arrests, was expressed by Gavin Ruxton, former Chief of Prosecutions at the ICTY, who stated that: "the arrest process lies at the very heart of the criminal justice process: unless the accused are taken into custody, we will have no trials; no development of the law by the courts; and ultimately, no international justice" (Ruxton, 2001: 19; see also Dłubak, 2012: 210). On the other hand, given that not all of the ICC's arrest warrants are outstanding it could be suggested that states have chosen when to cooperate with the Court selectively which is possibly incompatible with the attainment of justice,⁷⁸ an argument which will be explored further in Section 7.3.2. Having explored the controversy of outstanding arrest warrants and an apparent reluctance of cooperation above, this thesis will

⁷⁷ Article 63 of the *Rome Statute* prohibits the ICC from conducting trials *in absentia* unless the defendant "continues to disrupt the trial" (see ICC, 2011b: 41; see also Schabas, 2010c: 750-760; Klerks, 2008: 38-42).

⁷⁸ See Section 3.4.2 for the relationship between consistency and justice.

now investigate the concern that the actions of both state parties and the UNSC have resulted in the ICC's operations becoming politicised.

2.3.3 The Security Council and the Politicisation of International Criminal Justice

The third political controversy facing the ICC is the allegation that the actions of the UNSC have created an impression that the work of the Court has been politicised.⁷⁹ During the Rome Conference, the role, if any, of the UNSC in the ICC process was one of the most controversial issues (see Williams and Schabas, 2008; Benedetti and Washburn, 1999; Yee, 1999), with an overriding concern being that too much power for the Security Council would risk politicising the Court's work.⁸⁰ Those delegations opposed to any role for the UNSC, such as India, Iraq, Mexico, Pakistan and Syria, were particularly troubled by the fact that a strong Security Council presence in the ICC process would allow the P5 to not only use the ICC to buttress their own political agendas but also use their veto to prevent the Court from intervening in their own affairs or those of strategic importance to them (see Williams and Schabas, 2008: 568; Benedetti and Washburn, 1999; Yee, 1999: 146-147).⁸¹ In other words, concerns relating to a UNSC role in the ICC process were premised on the ease at which P5 members would be able to shelter their own nationals, as well as those of their allies, from the Court's jurisdiction (see Arbour, 2014: 198; Kramer and Killeen, 2012: 119; Ainley, 2011a: 321; Mamdani, 2009: 284). Nevertheless, despite fierce opposition from the aforementioned delegations, Lionel Yee recalled that a majority of those present supported the establishment of a working

⁷⁹ A possible problem with this argument is that it supposes the existence of a legal vacuum which does not exist. As such, and as will be argued in Section 6.2.2, politics will always play a role in the UNSC's decision making on ICC referrals but this need not necessarily result in a politicisation of the justice.

⁸⁰ Initially, the International Law Commission's (ILC's) *Draft Statute for an International Criminal Court* outlined an enhanced tripartite role for the UNSC, with the ability to: determine acts of aggression, make referrals, and approve ICC investigations into situations of shared interest (see UN, 1994: 10-11).

⁸¹ In fact, Indian policymakers have often explained that their decision not to sign the Rome Statute was heavily influenced by the existence of provisions which would allow "escape routes for those accused of serious crimes but with clout in the U.N body" (see The Hindu, 2005; see also Ramanathan, 2005: 632-633).

relationship between the UNSC and the proposed court (see 1999: 147). Eventually a compromise was reached in the form of the Singapore Proposal (see Bergsmo and Pejic, 2008: 597; Yee, 1999: 150) which, when combined with *addendums* offered by Canada and Costa Rica, was used to compose Articles 13(b) and 16 of the *Rome Statute* (see ICC, 2011b: 11 and 13). As such, under the current *Rome Statute* arrangement, the UNSC possesses the ability to make referrals but its proposed power of approval was replaced by one of deferral whereby the Security Council could vote to suspend an ICC investigation or prosecution for a 12 month period with the option of renewal.

Since the ICC's inception in July 2002, the UNSC has twice used its power of referral: first, on 31 March 2005 Resolution 1593 referred the Darfur situation to the ICC (see UN, 2005c); and second, on 26 February 2011 Resolution 1970 referred the Libyan situation to the Court (see UN, 2011c).⁸² But, it should be noted that controversies surrounding the ICC/UNSC relationship have not subsided (see Verduzco, 2015; Arbour, 2014; Popovski, 2014; Kaye *et al*, 2013; Papenfuss, 2013; Trahan, 2013; Kramer and Killeen, 2012; Mistry and Verduzco, 2012; Moss, 2012; White and Cryer, 2009). An oft-cited concern of the ICC/UNSC relationship is that currently three of the five permanent Security Council members, China, Russia and the US, are yet to ratify the *Rome Statute* (see Arbour, 2014: 198; Forsythe, 2012: 862-863; Kramer and Killeen, 2012: 119; Mistry and Verduzco, 2012: 3). This is perhaps problematic because it creates the impression of "double standards" (Forsythe, 2012: 862) or hypocrisy where three of the P5 are able and willing to use the ICC against other regimes but are not

⁸² As of yet, the UNSC has not used its power of deferral to suspend an active ICC investigation or prosecution; although a proposal from the Kenyan government was rejected on 15 November 2013 (UN, 2013a; 2013b). However, Resolutions 1422 (UN, 2002b), 1487 (UN, 2003) and 1497 (UN, 2012b) were pre-emptive deferrals which prohibited the ICC from investigating or prosecuting individuals involved in UN peacekeeping missions from non-state parties (see Deen-Racsmany, 2009; Jain, 2005; Stahn, 2003).

prepared to subject their own administrations to the same levels of scrutiny (see also Arbour, 2014: 198-199; Kramer and Killean, 2012: 119; Mistry and Verduzco, 2012: 3). In fact, David Forsythe has suggested that this reality may result in the creation of “political trials” because any investigation and trials launched via this manner will be “dependent on political choice and political limitations” (Forsythe, 2012: 863; see also Mistry and Verduzco, 2012: 3).

However, this thesis is most concerned with the alleged politicisation of the ICC’s workings that have stemmed from the UNSC’s practice. On the one hand, it is possible to argue that the politicisation concern raised at the Rome Conference, regarding the P5’s ability to shield their allies from the ICC, has occurred in the Syrian situation. Humanitarian Non-Governmental Organisations (NGOs) (see Amnesty, 2014; FIDH, 2012; HRW, 2012), global media outlets (see The Guardian, 2014; Al Jazeera, 2013) and the UN’s *Independent International Commission of Inquiry on the Syrian Arab Republic* (see UN, 2016),⁸³ have reported that international crimes have been, and continue to be, committed by all sides in the Syrian conflict. These reports have been greeted by calls from NGOs, including Amnesty International and Human Rights Watch (HRW) (see Yahoo News, 2013),⁸⁴ and states, such as France (see I24 News, 2014) and the United Kingdom (UK) (see Gov.UK, 2013),⁸⁵ for the UNSC to refer the situation in Syria to the ICC. However, the incumbent Syrian administration of Bashar al-Assad is closely allied with the Russian and Chinese governments (see Calamur, 2013; Peel, 2013) who have thus far vetoed all intervention efforts from the UNSC, including

⁸³ So far, the UN’s *Independent International Commission of Inquiry on the Syrian Arab Republic* have released 12 reports, all of which include evidence suggesting the commission of international crimes during the Syrian Civil War.

⁸⁴ On 15 May 2014, over 100 humanitarian Non-Governmental Organisations (NGOs) signed a letter urging the UNSC to refer the Syrian situation to the ICC (NPWJ, 2014).

⁸⁵ France’s proposed Draft Resolution to refer Syria to the ICC in May 2014 was supported by 58 states (UN, 2014d).

an attempted ICC referral on 22 May 2014 (see UN, 2014d; 2014a).⁸⁶ In other words, countervailing political forces have obstructed the ICC from operating in Syria and allowed those responsible for international crimes to continue to act with impunity.

On the other hand, whereas alleged politicisation has prevented the ICC from operating in the Syrian situation, it can also be suggested that the referral of the Libyan situation was intended to serve a purpose of a political nature at the expense of those of an ethical or legal persuasion.⁸⁷ Central to this argument is the suggestion that UNSC Resolution 1970, which included the referral to the ICC as well as some more targeted sanctions, was intended to apply pressure to the Libyan government of Muammar Gaddafi and ultimately bring about regime change (see Hoile, 2014b; McMillan and Mickler, 2013; Arbour, 2012; Ignatieff, 2012; Kramer and Killean, 2012; Bellamy and Williams, 2011). Supporting this argument, whereas Resolution 1593 specifically referred to accountability efforts against the “Government of Sudan and all other parties to the conflict in Darfur” (see UN, 2005c: 1), Resolution 1970 appeared to focus its accountability efforts solely against the “Libyan authorities” (see UN, 2011c: 2).

Moreover, the idea of ending Gaddafi’s reign and removing his influence in Libya was a common narrative underpinning many of the political statements that followed the adoption of Resolution 1970. For instance, when addressing the UK’s House of Commons on 28 February 2011, then Prime Minister David Cameron stated: “we should be clear. For the future of Libya and its people, Colonel Gaddafi’s regime must end and he must leave... [and that] we are taking every step possible to isolate the Gaddafi regime” (see Hansard, 2011).

⁸⁶ In addition to the vetoes on 22 May 2014, China and Russia have made three more on 4 October 2011 (UN, 2011d; 2011e), 4 February 2012 (UN, 2012c; 2012d) and 19 July 2012 (UN, 2012e; 2012f).

⁸⁷ This is not to say that there was not a political purpose to the Darfur referral but just that it was not pursued at the expense of the ethical and legal ones.

Likewise, on 3 March 2011, United States (US) President Barack Obama called on Gaddafi to “step down from power and leave” because he “has lost the legitimacy to lead” (as cited in Landler, 2011).

Finally, in addition to this rhetorical evidence, Amanda Kramer and Rachel Killean argued that the speed at which the UNSC sidelined their support for the ICC’s accountability efforts in Libya following the fall of Gaddafi, as well as their subsequent refusal to follow-up or support the Court’s proceedings in Libya, only serves to affirm suspicions that regime change, as opposed to the pursuit of international criminal justice, was the underlying goal of the referral of the Libyan situation to the ICC (see 2012: 131-132).⁸⁸ Thus, because regime change rather than individual criminal accountability was possibly the primary motive behind the Libyan referral, it can be used as an example of how some of the actions of the UNSC have politicised the ICC’s search for international criminal justice.

In sum, perhaps the primary controversy regarding the UNSC/ICC relationship relates to the extent to which the Security Council has allowed politics to determine when it has used its power of referral and subsequently where the Court can operate. This is problematic because it creates the impression that the ICC is a tool used to support the political goals and interests of the UNSC’s permanent members. By remaining absent from the ICC, China, Russia and the US are undermining the Court’s legitimacy by subjecting it to accusations of hypocrisy and political manipulation. Moreover, the absent permanent UNSC members are damaging the ICC’s credibility by continuing to protect their own nationals, as well as those of their allies, from the Court’s jurisdiction whilst simultaneously using it to target commonly viewed international pariahs and to advance their own political gains. As such, it is possible to suggest,

⁸⁸ The lack of UNSC follow-up will be discussed in more detail in Section 7.4.2.

as William Schabas does, that one of the main controversies facing the ICC “is not an obsession with Africa but rather a slow but perceptive shift of the Court away from the apparent independence shown in its early years towards a rather compliant relationship with the Security Council and the great powers” (see 2011b). Having discussed the controversial nature of the UNSC/ICC relationship and the extent to which it has politicised the work of the Court, this thesis will now move onto the final controversy, that of the practice of self-referrals.

2.3.4 The Practice of Self-Referrals

The final political or external controversy relates to the practice of self-referrals⁸⁹ which, as the name suggests, occurs when a situation is referred to the ICC by the government of the territory where the alleged crimes took place. A discussion on self-referrals is perhaps essential insofar as the practice dominated much of the ICC’s early work, with the Court’s jurisdiction in three, the DRC, Uganda and Central African Republic I (CAR I), of its first four Full Investigations being triggered by this method.⁹⁰ In fact, the central part played by self-referrals in the ICC’s early work was in part, or perhaps even entirely, a result of Luis Moreno-Ocampo’s decision to adopt a “policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court” (see ICC, 2006b: 7). In other words, Moreno-Ocampo actively encouraged states to self-refer situations to the ICC to the extent that it became a frontline policy of the OTP (see Müller and Stegmiller, 2010: 1269; Stigen, 2008: 401; Cassese, 2006: 436; Gaeta, 2004: 949).

⁸⁹ Although self-referrals appears to now be the accepted name within the literature, the same practice has been referred to as “auto-referrals” (see Kleffner, 2008a) and “voluntary referrals” (see ICC, 2006b: 7; Arsanjani and Reisman, 2005: 386-387).

⁹⁰ The willingness of states to partake in the practice of self-referrals was perhaps a shock to commentators who assumed that states would endeavour to protect themselves at all costs against external influence in their domestic affairs (Robinson, 2011; Akhavan, 2010; Arsanjani and Reisman, 2005; Wedgwood, 1999).

However, despite the prominent role self-referrals played in the early work of the ICC, the legitimacy of the practice was challenged with many mainstream academic commentators suggesting that self-referrals were not envisioned as a jurisdiction trigger by the drafters of the *Rome Statute* (see Müller and Stegmiller, 2010: 1269; Schabas, 2008a: 751; 2008b: 7-16; 2006: 27; Arsanjani and Reisman, 2005: 386-387). For instance, Mahnoush Arsanjani and Michael Reisman argued that: “there is no indication that the drafters ever contemplated that the Statute would include *voluntary* state referrals to the Court of difficult cases arising in their own territory” (2005: 386-387 original emphasis). Likewise, William Schabas, a vociferous critic of self-referrals, used this observation as the basis for his opposition (see 2008a: 751; see also Schabas, 2008b: 7-16) before labelling the practice as a “creative” (2008a: 761) and “novel” (2008a: 751) interpretation of Article 14 of the *Rome Statute* which “distorts the proper role of the Court” (2008a: 761; see also Schabas, 2006: 27).

Contrastingly, Darryl Robinson argued that Article 14 awards any state party the ability to refer any situation in any state party to the ICC for consideration, with no qualification exempting a “situation concerning its own territory” (2011: 359-361; see also Akhavan, 2005: 415). Furthermore, Robinson displayed evidence showing that self-referrals were actually envisioned as a possible trigger for the ICC’s jurisdiction during many of the preliminary discussions for the Court’s creation (2011: 361-364). These observations led to Robinson defending self-referrals as a legally legitimate trigger for the Court’s jurisdiction (see 2011; see also Akhavan, 2011; Akhavan, 2010; 2005; Kress, 2004). This argument had already been affirmed by Trial Chamber II, who, in their confirmation of the admissibility of the OTP’s case against Congolese warlord Germain Katanga on 16 June 2009, clarified the dispute regarding the legitimacy of self-referrals by stating that: “a State may... refer a situation concerning its territory to the Court if it considers it opportune to do so” (see ICC, 2009a: 32).

Nonetheless, the practice of self-referral remains shrouded in much controversy and has been the subject of many discussions which have sought to identify both its strengths and weaknesses. This thesis identified three benefits of self-referrals. First, from the outset an independent prosecutor was one of the most contentious issues relating to the proposed international criminal court (see de Gurmendi, 1999) because it challenged the self-declared right of states as the sole moral arbitrators in international society (see Ralph, 2007: 96-104; see also Sadat and Carden, 2000). As such, Paola Gaeta argued that Moreno-Ocampo considered self-referrals as the most effective means for demonstrating that the ICC was not challenging the status quo by portraying the Court as “an institution that can assist states to obtain justice... rather than as an interfering international watchdog against which states have to defend themselves” (2004: 950). Second, as was alluded to in Section 2.3.2, much of the success of the ICC will depend on the support it receives from the international community, most notably from the state on whose territory the alleged crimes were committed. This reliance on cooperation was integral in Moreno-Ocampo’s decision to pursue a policy encouraging self-referrals because it was believed that a state would be more willing to cooperate with ICC proceedings if it had requested the Court’s assistance rather than been targeted against their will (see Müller and Stegmiller, 2010: 1269; Schiff, 2008: 199; Cassese, 2006: 436; Gaeta, 2004: 450). Finally, Jo Stigen argued that: “when the ICC Prosecutor beforehand has encouraged the self-referral... he or she will in reality already have made a positive decision to open an investigation” (2008: 401). Thus, building on Stigen’s observation, it is possible to suggest that self-referrals were pursued by the OTP as a matter of convenience in an attempt to expedite ICC proceedings by negating the need to gain Pre-Trial Chamber (PTC) approval for an investigation, a requirement of *proprio motu* referrals, which can prove a lengthy process (see Akhavan, 2005: 406; Gaeta, 2004: 949-950).

In sum, from the three justifications outlined above it can be seen that the primary rationale behind pursuing self-referrals was instrumental inasmuch as they were designed to address concerns regarding, and support the work of, the OTP in the early years (see Schiff, 2008: 199-201). However, it is important to note that the potential negative consequences of this system. This thesis has identified two interrelated arguments surrounding the practice of self-referrals both related to the fear that they could result in the politicisation of the ICC's work by jeopardising its ability to operate independent of political influences and thus render fair and impartial justice (see Akhavan, 2010: 106; 2005: 411; Schiff, 2008: 200; Schabas, 2006: 27; Arsanjani and Reisman, 2005: 385).⁹¹

First, it has been suggested that allowing situation states to refer atrocities being committed on their own territories to the ICC leaves the process susceptible to political manipulation on two levels (see Robinson, 2011: 367-370; Stigen, 2008: 401; Schabas, 2008a: 751-753; 2008b: 16-19; Cassese, 2006: 436; Arsanjani and Reisman, 2005: 392-395; Gaeta, 2004: 951-952). At the broad level, Arsanjani and Reisman raised the concern that the OTP's policy of encouraging self-referrals may result in the ICC being used instrumentally by states to address domestic political and security problems, arguing that: "the move [the Ugandan self-referral] could encourage governments to externalise... domestic political problems they are unable or unwilling – because they do not wish to invest the necessary resources – to manage or resolve" (2005: 392; see also Gaeta, 2004: 952).⁹² At a narrower level, it has been suggested that the self-referral process is vulnerable to being hijacked by governments seeking to "isolate" (see Schabas, 2008a: 753), "marginalise" (see Stigen, 2008: 401) or even

⁹¹ The importance of notions of impartiality will be discussed in Section 3.4.3.

⁹² Paola Gaeta explained that it is possible that a "state could be using the Court as a political weapon in the hope that its intervention could assist it in achieving its domestic political and military aims" (2004).

“dispose of” (see Cassese, 2006: 436) political opponents by casting them as potential war criminals (see also Schabas, 2008b: 16-19; Arsanjani and Reisman, 2005: 392-395).⁹³ Therefore, a core concern regarding the practice of self-referrals is that allowing states to play a central role in the selection process for matters concerning their own territory leaves the ICC open to political manipulation because it is impossible to ever know the true intentions of the referring government.⁹⁴

Furthermore, it should be noted that many of the situations that find themselves in the ICC spotlight cannot be categorised as one-sided conflicts insofar as atrocities are alleged to have been committed by both government and non-government forces. However, it has been argued that a policy of encouraging self-referrals, paired with the previously discussed reliance of the ICC on state cooperation, may result in the development of “*quid pro quo*” (see Kress, 2004: 948) arrangements which result in asymmetrical or even one-sided investigations that focus primarily, or even entirely, on non-government forces (see Müller and Stegmiller, 2010: 1270; Schabas, 2008a: 751-753; 2008b: 16-19; Cassese, 2006: 436; Arsanjani and Reisman, 2005: 394-395; Gaeta, 2004: 951-952; Kress, 2004: 946-948). Schabas cited the Ugandan situation as an example of this concern and criticised the rationale of self-referrals by arguing that in reality “no government anywhere would respond... to an invitation... to, in practice, prosecute themselves” (2008a: 753). As such, self-referrals can be said to come with a cost insofar as they effectively create a working relationship between the referring state and the OTP which may negatively impact on future proceedings (see Müller and Stegmiller,

⁹³ Elsewhere, William Schabas argued that: “when a state is actively engaged in the initiation process, there is potential for manipulation. In effect, the state quite predictably uses the international institution to pursue its enemies” (2008b). In the Ugandan context, Mahnoush Arsanjani and Michael Reisman suggested that Museveni’s government attempted to use the ICC as a means to help address the stability problems caused by the Lord’s Resistance Army (LRA) (2005).

⁹⁴ It is plausible that a state refers a situation to the ICC for sincere reasons but it is more likely that underlying political motives are at play.

2010: 1285; Schabas, 2008a: 753). Moreover, Andreas Müller and Ignaz Stegmiller suggested that “negotiations and compromises” made during the referral stage “can limit the Prosecutor’s space to manoeuvre at a later stage” and muddy or even politicise the justice pursued by the ICC (see 2010: 1285). Thus, whether intended or not, an underlying issue with the practice of self-referrals is that they establish a somewhat conterminous relationship between the referring state and the OTP which has the potential to shape ICC proceedings.

2.3.5 Summary

These observations, outlined above, are interesting for this thesis because they purport that some of the ICC’s shortcomings may have been caused by the actions of stakeholders over which the Court has no control. In other words, the ICC itself may in fact not have been solely responsible for the troubles it faces. Furthermore, although some of these controversies concern certain ICC procedures, such as referral mechanisms and the cooperation regime, they actually relate to the way in which these procedures have been put into practice by stakeholders external to the Court, namely the UNSC and states parties. Finally, as was the case for the institutional controversies discussed in Section 2.2 and highlighted as a gap in the literature in Section 1.2, none of the discussions surrounding these criticisms have attempted to offer explanations which use theoretical notions of justice. Again, this reality is problematic because, as will be shown below, concepts and facets of justice could be used to enhance our understanding of these criticisms levelled against the ICC and its stakeholders.

With regards to the first concern, notions of social justice, particularly the institutionalisation of accepted standards of behaviour, could be used to explain why a more universal ICC membership would be preferable. This is because increasing membership would simultaneously increase the number of states obligated to comply with the ICC’s decisions

and who hold rights and duties under the regime of international criminal justice. As such, given the apparent normative pull of justice institutions on states, by virtue of increasing the reputation costs of non-conformity or being subjected to an ICC investigation, then it could be assumed that an increase in the Court's membership may bring about a greater level of compliance with not only ICC requests but also broader norms of the international criminal justice regime. Furthermore, although the ICC's credibility and legitimacy could be improved by expanding its membership, its lack of universality does not prevent the Court, or its stakeholders, from acting justly. For instance, under the current arrangement, where the universality of the ICC is dependent on the decisions of the UNSC, it is still possible for justice to be served so long as the Security Council can be seen to be using their referral power as a means for supporting the interests of the weakest members within a transaction, namely the victims of international crimes, and not serving the interests of themselves or their allies.

Likewise, the issue surrounding outstanding arrest warrants and the inconsistent enforcement of them by states parties could be expanded, and perhaps better understood, by applying a justice framework to it. This is because the practice of inconsistently actioning ICC arrest warrants is problematic with regards to its compatibility with justice on three grounds. First, any lack of consistency in actions when addressing a comparable situation and/or decision can be considered a violation of the justice as consistency principle. Second, when states sign up to the ICC they become legally obliged to comply with its requests and decisions. Thus, any refusal to enforce an arrest warrant is tantamount to acting unjustly because it violates the notion of justice which defines a just action as one which is legal. Lastly, the refusal to enact, or ignoring of, an ICC arrest warrant by a state party could be used as an

example of unvirtuous behaviour.⁹⁵ The basis of any functioning legal system is *pacta sunt servanda*, the idea that formal agreements must be kept, which prioritises virtues such as trust, honour and integrity. However, when a state party fails to comply with an ICC arrest warrant it can be suggested that they are not displaying these desirable characteristics and as such could be said to be acting in an unvirtuous, or unjust, manner.

Finally, the last two controversies, the possible politicisation of ICC justice by the UNSC and the practice of self-referrals by states parties, can both be expanded using the same aspects of justice theory. For instance, the argument which suggests that the decisions of the P5 in relation to the referrals of the situations in Libya and Syria were underpinned by political factors, such as desires for regime change in Libya or China and Russia's alliances with and support for the Assad government in Syria, perhaps goes against justice's requirement of impartiality. This is because it can be suggested that the P5's decision-making regarding the Libyan situation was driven by an underlying anti-Gaddafi bias, whereas, that surrounding the Syrian situation is perhaps indicative of China and Russia showing the Assad government a degree of favouritism. Furthermore, the extent to which China and Russia's decision to veto the ICC's involvement in the Syrian situation is compatible with justice's demands that decisions serve the interests of the weakest or most vulnerable is debatable. This is because by vetoing the ICC's involvement in Syria, China and Russia have not only awarded Assad, his government, and others responsible for committing international crimes in the conflict impunity and the freedom to continue acting in that manner but also simultaneously denied Syrian victims access to the justice and redress mechanisms they require and perhaps even deserve.

⁹⁵ Such an analysis requires that states be analysed as if they were persons (see Wendt, 2004).

Likewise, these same two observations, a lack of impartiality and not serving the interests of the weakest members of society, are relevant to the concern that self-referrals can be used by governments to ostracise and delegitimise political opponents, to protect themselves from prosecution, and/or to create a smokescreen to hide their incompetence or inability to solve the issues at hand. This is because if these aforementioned political factors do underpin decision-making, and not a desire to pursue individual criminal accountability and end impunity for international crimes, then the impartiality of these decisions can be questioned because they have perhaps been influenced by factors incompatible with the core objectives of the ICC. Moreover, if, as these arguments suggest, statespeople and their governments are attempting to use the ICC as a tool for pursuing their own political agendas and/or interests, it can be argued that such actions are unjust inasmuch as they are incompatible with justice's demands that decisions serve/promote the interests of the weakest or most vulnerable members with a given transaction.

2.4 Chapter Summary

This literature paints a mixed picture of the ICC's performance and has raised many controversies relating to the practice of both the Court itself and some of its primary stakeholders. Some of the discussions and observations highlighted in this Chapter relate directly to the research themes of this thesis. For example, all of the controversies raised concern matters relating to practice, not shortcomings with the procedural or purposive framework of the ICC. Moreover, the discussions on the ICC's performance were particularly useful in highlighting the main stakeholders within the ICC regime, namely: the OTP, Chief Prosecutor, states parties, and the UNSC. It is the practice of these stakeholders which will be explored further in Chapter Seven. As has been shown by the analysis in this Chapter, theoretical conceptions of justice can not only be used to advance the criticisms levelled

against the ICC but also offer a more nuanced understanding of the issues they pose with regards to the Court's ability to effectively pursue and fulfil its mandate. Finally, the variety of opinions on similar topics suggest that the literature on the ICC is heavily polarised (see Wegner, 2015; Ali, 2014; Dersso, 2009; Simpson, 2008; Mégret, 2001),⁹⁶ insofar as a majority of discussions are either supportive or opposed to the Court and thus either defend or criticise it based on these initial underlying positions.⁹⁷ This is an area that this thesis would like to address by showing that the ICC need not be viewed in such a binary manner where analytical observations are shaped by whether or not a commentator supports or opposes the Court's existence. The following Chapters in this thesis seek to address some of these gaps and shortcomings in the literature and further explore some of the core themes identified. It will do this by first building a normative framework based on justice theory before applying it to data collected from a variety of sources.

⁹⁶ Recalling the discussion from Section 1.3, it should be noted that polarised opinions were present from the ICC's outset.

⁹⁷ The polarisation of the ICC literature perhaps is to be expected, given the heavy polarisation of opinions which surround the use of justice as a means for aiding post-conflict resolution and reconstruction (see Ainley, Friedman and Mahony, 2015; Clark, 2012; Clark, 2011).

Chapter Three

Theories and Understandings of Justice

3.1 Introduction

The final paragraph of the *Rome Statute's Preamble* lists a goal of the International Criminal Court (ICC) as being to: “guarantee lasting respect for and the enforcement of international justice” (see ICC, 2011b: 1). Now, whether it be former United Nations (UN) Secretary General Kofi Annan’s early “promise of universal justice” (see 1997), current Chief Prosecutor Fatou Bensouda’s call “deliver justice” (see 2016: 8), or the plethora of academic literature that features the term justice in the title (see Ali, 2014; Bosco, 2014; Hoile, 2014a; 2014b; Nouwen and Werner, 2010; Clarke, 2009), pursuing justice and acting justly should perhaps be considered as two of the Court’s overarching goals. But, this claim poses two broader questions: what is justice and what does it mean to be acting justly? The purpose of this Chapter is to offer answers to these questions through a review of the theoretical literature on the concept of justice. This discussion will then be used to build a normative framework upon which the compatibility of the ICC’s purposes, procedures and stakeholder practices can be analysed.

3.1.1 What is Justice?

A core feature of the concept of justice is that it is multi-faceted and, as will be shown below, relates to many referents. This said, this thesis has been able to identify two general features of justice: serving as a check on neo-liberal conceptions of politics as self-interest and defining notions of right and wrong. Both of these general features have deep philosophical roots and feature heavily in the theoretical literature surrounding the concept. For instance, in his *Nicomachean Ethics*, Aristotle defined “universal justice” as righteous behaviour and

suggested that what separates justice from other virtues is that it involves helping or considering others: “justice, alone of the virtues, is thought to be ‘another’s good’, because it is related to another; for it does what is advantageous to another, either ruler or a co-partner” (see 350BCE:2009: 80-82). Similarly, in his essay *Utilitarianism*, John Stuart Mill contested that “justice is the name for certain classes of moral rules, which concern the essentials of human well-being” because these rules help societies to identify right and wrong actions (see 2008: 176-201).

Furthermore, these generalities continue to appear in more recent⁹⁸ theoretical discussions on justice. Walter Kaufman, in his article *The Origin of Justice*, succinctly linked the two aforementioned features when he argued that: “justice is held to have developed out of resentment against wrongs done to others with whom we sympathize” (1969: 230).⁹⁹ Likewise, the entire basis of John Rawls’ seminal work, *A Theory of Justice*, contends that when underpinned by justice social institutions reflect the right way to organise a society and make decisions so that all actions provide mutual benefits for all members, but particularly the weakest and most vulnerable (see Rawls, 1999b; 1971).¹⁰⁰ As such, it can be suggested that at the most general level, justice refers to identifying and defining notions of right and wrong, and overcoming conceptions of political self-interest for the common good of a society.

⁹⁸ Recent here refers to the last large wave of academic discussions on justice during the 1960s, 70s and 80s (see Scanlon, 1986; 1982; 1973; Rawls, 1985; 1971; 1963; Nozick, 1981; 1974; Beitz, 1979a; Kamenka, 1979; Lucas, 1972; Kelsen, 1971; Kaufmann, 1969; Ginsberg, 1965) because the mainstream academic focus, with the exception of Amartya Sen (see 2009; 2006; 1990), appears to have shifted away from the concept.

⁹⁹ It could be argued that this idea about sympathising with others who have been wronged is a backbone of the international criminal justice regime.

¹⁰⁰ John Rawls’ work was initially published in 1971 but from now on this thesis will use the revised edition published in 1999.

In the context of the ICC, these two general features of justice can be seen as central to the Court's cause and functioning. At the most basic level, Kaufman's abovementioned depiction of justice, sympathising with others who have been wronged, perhaps forms the backbone of the international criminal justice regime. This is because the regime of international criminal justice underpinned by the ICC is built on the belief that impunity for international crimes should not be tolerated and that the victims of, and communities affected by, international crimes should not be left without a sense of justice for the wrongs committed against them. Moreover, international criminal law, as applied by the ICC and codified within the *Rome Statute*, is heavily concerned with notions of right and wrong across many levels, from the substantive elements that define prohibited conduct to the procedural aspects which outline the correct way for this conduct to be investigated and prosecuted. Finally, the creation of the ICC was arguably driven by a belief that responses to international crimes should not be driven by political self-interest but instead by a desire to protect and uphold the rights of all peoples. Applying Rawls' aforementioned thesis, in theory rather than serving the interests of political actors in positions of power, such as the great powers, their allies, or culpable governments, responses to international crimes and the search for international criminal justice should serve the interests of the weakest and most vulnerable members of international society, including direct victims, affected communities, and states that have been desolated by the actions of non-state actors.¹⁰¹

However, beyond these two generalities, understandings of justice are more difficult to identify, not least because there is no universally accepted definition of justice or a just action. The lack of a universal definition or understanding is a core feature of the literature

¹⁰¹ Payam Akhavan makes a compelling case that sometimes states may be the victims rather than the perpetrators of international crimes (see 2010).

surrounding justice. In Hedley Bull's words, "justice is a term which can ultimately be given only some kind of private or subjective definition" (2002: 75). Likewise, Hans Kelsen identified justice as a "social phenomenon" which differs greatly "according to the nature of the society within which it arises" (1971: 7). Finally, Eugene Kamenka observed that: "the problem of justice cannot be resolved by recourse to the myth of a single, common underlying morality that we all share... [I]t is impossible to give a satisfactory grounding in logic to the conception of justice as more than a specific social tradition" (1979: 2). Thus, it can be argued that notions of justice are subjective and dependent on the context they appear in, the value structure of the society in question, and/or the philosophical opinions of the commentator analysing them. Therefore, it is important to acknowledge that the framework is author subjective and draws on a Rawlsian conception of justice.

The final issue with identifying justice in a general sense is that it relates to many different elements of societal actions and structures. Rawls argued that because many things can be said to be just or unjust, including laws, institutions, social arrangements, procedures, decisions, judgments, actions, attitudes and persons, thus it is important for analysts to identify and distinguish between the referents of justice on which they are focussing (see Rawls, 1999b: 6-10; 1958: 164-165). For this thesis, not all of the aforementioned referents of justice need to be analysed separately because they are not all relevant to the discussion and many of them that are can be discussed together. Instead, this Chapter will focus on the four core elements related to the ICC: institutions, procedures, decisions and actions. In order to do this, the Chapter will be divided into three sections. The first section will focus on the relationship between justice and institutions. The second section looks at the connection between justice and procedures, particularly how different procedural arrangements are categorised and how procedures can be measured as being just. Finally, the third section will

examine the different ways through which decisions and/or actions can be considered to be just.

3.2 Justice, Society and Institutions: Social Justice

In general, the principles of social justice concern the relationship between constituents and their societies. In fact, the possible determinative relationship between justice and societies was alluded to by Morris Ginsberg who claimed that it is justice that helps establish and maintain the institutions necessary for “social organisation” (see 1965: 67-68). Similarly, David Miller argued: “justice is more than simply a virtue that rulers should possess: it is fundamental to the institutions that turn a mass of individuals into a political community” (2003: 74). Here, both Ginsberg and Miller appear to echo Rawls’ early depiction in his *Theory of Justice* that: “justice is the first virtue of social institutions” (1999b: 3).

For this thesis, institutions are defined as social arrangements that exist in the form of a collection of formal rules, norms and practices that guide and govern social action (see Duffield, 2007; Bull, 2002: 68-71; Rawls, 1999b: 47-52; Turner, 1997: 6; North, 1990: 3-53; Keohane, 1988: 382-386; Krasner, 1983: 2). According to Rawls, institutions are required to be embedded with the principles of social justice as a means for helping to overcome the inevitable conflict of interests that arise in political organisations and thus the principles of social justice help to establish an environment that buttresses the required cooperation for achieving mutually beneficial goals (see 1999b: 4-5). Moreover, Rawls suggested that principles of social justice help ensure that decisions are considered and actioned by relevant actors and institutions so that they produce outcomes that are desirable for all (see 1999b: 4-5). This thesis argues that the principles of social justice, and subsequently the institutions they underpin, primarily serve two roles within a society. First, and as identified by Rawls, the

principles of social justice “provide a way for assigning rights and duties in the basic institutions of society” so that mutually beneficial endeavours can be pursued (see 1999b: 4). Second, once these rights and duties have been assigned to the relevant actors and, as often happens, formalised in law, institutions embedded with the principles of social justice exert a normative influence that can help ensure compliance with said laws by identifying notions of right and wrong conduct (see McLaughlin Mitchell and Hensel, 2007; Checkel, 2003; Raustiala and Slaughter, 2002: 540; Risse, Ropp and Sikkink, 1999; Kratochwil, 1989; Keohane, 1988). The remainder of this Section will discuss these two roles in more detail.

3.2.1 Justice, Institutions, Rights and Duties

The relationship between justice and the assignment and distribution of rights and duties is a core feature of the academic literature pertaining to notions of social justice. For instance, John Passmore outlined that social justice demands that societal agents fulfil the “obligations” and recognise the “rights, which flow out of one’s membership of a political community” (1979: 31). Likewise, Brian Barry argued that: “whether we are dealing with individual acts or whole social institutions... the subject of justice is the distribution of rights and privileges, power and opportunities, and the command over material resources” (1989: 292). Finally, and in relation to international society, the distribution of rights and duties formed a core feature of Bull’s discussion on the role of justice within international relations (see 2002: 75-82; 2000b). For Bull, because a plethora of “agents and actors” exist within international society, including states, individuals and organisations, notions of justice are required to help us identify which of them hold “moral rights and duties” and the manner in which they are distributed (see 2002: 78). According to Bull, three forms of justice exist in relation to the study of international society, international or interstate, individual or human and

cosmopolitan or world, each of which depicts rights and duties as being held by, or at least intended to support the interests of, different agents (see 2002: 78).

Bull outlined that international or interstate justice concerns the rights and duties held by states not only under international law but also by virtue of their membership to international society (see 2002: 78). An example of these state rights and duties would be the right to sovereignty and its accompanying duty of non-intervention which are enshrined within the United Nations (UN) Charter (see UN, 1945). Furthermore, because states, and their representatives in the form of statespeople (see Jackson, 2000: 23-25; Wheeler, 2000), can continue to be considered the dominant actors within international relations (see Bell and Hindmoor, 2009; Mearsheimer, 2001; Waltz, 2000; 1979; Deng *et al*, 1996), they need to be recognised as the primary holders of rights and duties within international society.

Contrastingly, Bull defined individual or human justice as the rights and duties held by individual human beings under international law (see 2002: 79). Initially, notions of individual justice were grounded in the doctrine of natural law but more recently, perhaps since the production of treaties such as the *Universal Declaration of Human Rights* in 1948 (see UN, 1948b),¹⁰² individuals have become the subject of positive international law (see Bull, 2000b: 220). However, despite this creation of individual focussed positive international law, it is states that are primarily responsible for enforcing and protecting these individual rights; thus, arguably establishing a reality whereby states hold a duty to uphold individual rights making notions of international and individual justice mutually dependent on one another.

¹⁰² This forms part of the three treaties that are considered to be the *International Bill of Rights*. The other treaties included are: the *International Covenant on Civil and Political Rights* (see UN, 1976a) and its two additional protocols (see UN, 1976b; 1989), and the *International Covenant on Economic, Social and Cultural Rights* (see UN, 1976c).

Finally, Bull described cosmopolitan or world justice as existing when the rights and duties held by all actors within international society that concern “what is right or good for the world as a whole” (2002: 80-81). According to Bull, cosmopolitan justice does not concern a society of states but a “society of all mankind” (2002: 81). This idea suggests that certain interactions and debates within international society, such as arms reduction talks or discussions pertaining to environmental issues, concern humanity in its entirety. Thus, it should be noted that cosmopolitan justice does not specifically refer to the rights and duties held by constituent members, namely states or individuals, but instead a concept that controls action within international society in order to preserve the well-being, ensure the survival and promote the common good of humanity as a whole.

Now, given the ICC’s focus on the actions, liability and grievances of individuals it could be perceived that notions of individual justice are most relevant to its operation. However, in actual fact the ICC finds itself in the unusual situation where all three forms of justice could be classed as applicable, a reality which is potentially an issue insofar as it might become unclear whose interests the Court is promoting. On the one hand, the fact that the Court has an independent prosecutor with the power to open investigations independent of state consent, albeit with a jurisdiction limited to the state parties to the *Rome Statute*, is perhaps evidence of cosmopolitan justice; a global prosecutor, void of any national ties, pursuing justice for victims of international crimes on behalf of international society as a whole. On the other hand, the principle of complementarity (see Schabas, 2011a: 190-199), and the fact that the ICC has no independent police force, means that states form a primary component of the Court’s enforcement mechanism. This means that international justice becomes applicable for the ICC because it can be argued that states continue to hold the primary duty to not only prosecute international crimes within their own domestic criminal justice systems

but also enforce the decisions and requests of the Court in good faith. As will be alluded to in Chapter Seven, this could be seen as an issue for the ICC because there is an argument that suggests the Court has been unable to break-free from the shackles of the society of states. Nonetheless, the principle of complementarity, as well as others such as the irrelevance of official capacity which removes notions of sovereign immunity for government officials (see Schabas, 2011a: 244-247), perhaps indicate a notion of individual justice because they promote the rights of individuals by making the norms of sovereignty, non-intervention and sovereign immunity conditional on broader respect for globally recognised human rights standards; a vision often termed sovereignty as responsibility (see Deng, 2010; Slaughter, 2006; Armstrong, 1999; Frost, 1999; Deng *et al*, 1996). Thus, although the ICC falls short of a cosmopolitan revolution within international society, it does reflect a normative shift within international society whereby notions of individual justice are viewed in equal regards to international justice (see Gaskarth, 2012: 446; Ralph, 2007). Nevertheless, as discussed above, it can be argued that the duties of compliance with the ICC's normative ideals and its physical demands remains in the realm of states.

Having looked at who holds rights and duties within international society, now it is important to consider how they are distributed amongst its constituents. According to Bull, rights and duties can be distributed amongst societal members in accordance with two notions of justice: arithmetical and proportionate (see 2002: 77). For Bull, arithmetical justice holds that rights and duties are distributed equally between members of a society, in this case both individuals and states, regardless of their capabilities or status (see 2002: 77). Now, this idea of equal distribution of rights and duties is a mainstay of the academic literature. For instance, Amartya Sen argued that: "every normative theory of social justice that has received support and advocacy in recent time seems to demand equality of something – something

that is regarded as particularly important in that theory” (2009: 291). Likewise, John Harris purported that: “the principle that people’s lives and fundamental interests are of equal value and that they must therefore be given equal weight has immense intellectual appeal and intuitive force” (1988: 75). These claims of the importance of equality are outlined in Rawls’ first principle of justice which dictated that: “each person is to have equal right to the most extensive scheme of basic liberties compatible with a similar scheme of liberties for others” (1999b: 53). Finally, according to Ronald Dworkin rights can only be taken seriously if they are distributed in accordance with the principles of “political equality” which demands that “the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members” (1977: 198).

This notion of an equal distribution of rights and duties would appear to be the foundation upon which contemporary international society is founded. For example, Article 2 of the *UN Charter* appears to affirm the equality of all states: “[the UN is] based on the principle of the sovereign equality of all its members” (see UN, 1945: 3). Similarly, the *Preamble* of the *Universal Declaration of Human Rights* asserts a “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” (see UN, 1948b). This wording suggests that all states and statespeople hold equal duties to respect human rights and hold those who violate said rights to account. As alluded to above, the statecentric nature of international society, which makes an independent enforcement mechanism a difficult proposition, means that the ICC requires the cooperation of states to enforce its decisions.¹⁰³ This means that it can be argued that if the ICC is to be fully effective then the *Rome Statute*

¹⁰³ The International Criminal Court’s (ICC’s) reliance on cooperation to achieve its goals will be discussed further in Section 6.5.

needs to be ratified by a large number of states, so that it becomes almost universal in its jurisdiction. In fact, the importance given to achieving a broad ratification of the *Rome Statute* is perhaps affirmed by the time and resources dedicated to achieving it by the ICC and its civil society supporters.¹⁰⁴ The rationale behind prioritising full ratification and implementation of the *Rome Statute* is linked to the idea that international society is structured in accordance with, what Bull termed, arithmetical justice, the equal rights and duties of states. In line with such a vision, it is presumed that by extending the ICC's jurisdiction, via full ratification and implementation of the *Rome Statute*, would emphasise the equal duties of all states to uphold the norms and values promoted by the ICC.

However, the extent to which international society is in fact ordered in accordance with the principles of arithmetical justice is debatable. This is because, despite the wording of the *UN Charter*, the UN system and international society more broadly is in fact hierarchically structured (see Clapton, 2014; 2009; Clark, 2009a; Lake, 2009; Lake, 2007; MacDonald and Lake, 2008; Kang, 2004; Simpson, 2004; Dunne, 2003). Moreover, the practice of diplomacy is not built in accordance with equal status of all participants. Instead, it is dominated by underlying global power structures whereby these agents with more power invariably have more influence by virtue of being able to shape the agenda and coerce others to accept their point of view. Thus, although in theory all states and statespeople hold equal rights and

¹⁰⁴ Parliamentarians for Global Action (PGA) have programmes dedicated to both gaining universality for the ICC and achieving full implementation of the *Rome Statute* into national law (see PGA, 2015a; 2015b). Likewise, the United Nation's Human Rights Council (HRC), in their Universal Periodic Review, continually call for non-ICC members to sign and ratify the *Rome Statute* as a means for displaying their commitment to supporting and upholding human rights (see Global Justice, 2015). Finally, since the Sixth Assembly of States Parties (ASP) Session in December 2007, the ICC has annually released reports entitled: *Plan of action of the Assembly of States Parties for achieving universality and full implementation of the Rome Statute of the International Criminal Court*. These can be viewed on the ASP Session section of the ICC Website (see ICC, 2017d).

duties, those states that exist at the top of the hierarchy arguably possess additional rights and duties pertaining to the governance of international society.

An institution that is indicative of this hierarchical structure is the United Nations Security Council (UNSC) which is comprised of five permanent members who hold the power to veto. This veto power is demonstrative of these five members holding additional rights, and subsequently duties, within international society, a role they hold solely on the basis of their historical standing as international actors. In the context of the ICC, the extra rights and duties held by the members of the UNSC, particularly the permanent ones, are depicted by Article 13(b) of the *Rome Statute* which awards the Security Council the ability to refer situations to the Court, regardless of if the state is a party to the *Rome Statute* or not (see ICC, 2011b: 11; see also Schabas, 2011a: 168-176). In addition to this power of referral, Article 16 of the *Rome Statute* details that the UNSC may, if they see fit, defer any ICC investigation and/or prosecution for a renewable period of twelve months (see ICC, 2011b: 12; see also Schabas, 2011a: 182-186). However, where these powers arguably become more indicative of the unequal distribution of rights and duties is the fact that the five permanent UNSC members hold the power to veto any attempt by the other Security Council members to refer a situation to the ICC or defer an existing one.¹⁰⁵

Therefore, given the hierarchical structure of international society, it can be argued that rights and duties within international society are in fact distributed in accordance with what Bull termed “proportionate justice”, where “rights and duties... are distributed according to the end in view” not the principle of equality (see 2002: 77). Bull defended

¹⁰⁵ This power is heavily criticised among global civil society actors, with Amnesty International leading calls for the removal of the United Nations Security Council’s (UNSC’s) veto powers to be removed in relation to matters concerning the commission of international crimes (see Amnesty, 2015: 3).

proportionate justice on the following grounds: “given that persons and groups are sometimes unequal in their capacities or in their needs, a rule that provides them with the same rights and duties may have the effect simply of further underlying their inequality” (2002: 77). In other words, because states are not equal in their capacity or their status within international society, rights and duties are distributed in accordance with notions of power, not equality, with the more powerful states, both materially and socially (see Dowding, 2016: 70),¹⁰⁶ holding additional rights and duties. For this thesis, these additional rights and duties, particularly those held by the UNSC’s permanent members, is accompanied by a responsibility to police international society. In the context of the ICC and the regime of international criminal justice, this means that the additional rights held by the powerful states should perhaps come with an additional set of responsibilities.

The basis for such an argument is reflected by the notion that the permanent members of the UNSC are supposed to act as “great responsables” (see Bull, 2002; 1980; 1971; Vincent, 1990) who were charged with absorbing more of the burden of maintaining international peace and security, and, more generally, upholding the norms and values upon which international society is built.¹⁰⁷ The philosophical underpinnings of the idea of the existence of “great responsables” is possibly defended by Rawls’ second principle of justice, the “difference principle” (see 1999b: 65-73); perhaps somewhat surprisingly given the underlying egalitarian basis of his thesis. According to Rawls’ second principle of justice,

¹⁰⁶ Keith Dowding refers to material and social power as outcome and social power, with the former involving the physical abilities to change an actor’s decision whereas the latter is the ability to change the agenda or structures where decisions are made (see 2016: 70).

¹⁰⁷ The role of great powers in maintaining international order is discussed by Bull (2002: 194-222).

“inequalities of wealth and authority, are only justified if they result in compensating benefits for everyone, and in particular the least advantaged members of society” (1999b).¹⁰⁸

Thus, the additional rights awarded to the permanent members of the UNSC, with regards to the administration of international criminal justice, arguably come as a result of the compensating benefits that an increase in international peace and security as well as a broader acceptance of human rights norms and the rule of law, all of which could emerge from the prosecution of those responsible for international crimes, would bring to all members of international society. As such, a central feature of the regime of international criminal justice, it can be argued in line with the work of Rawls, is that it is designed to shape international action away from conceptions of self-interest and towards more cosmopolitan, or utilitarian, notions of good for everyone; primarily the weakest members of society, possibly in the case of international crimes the victims, affected communities, and possibly states (see Akhavan, 2010). However, as will be demonstrated by this thesis, it can be suggested that these additional powers held by the UNSC have in fact translated into a situation whereby a two-tiered system of justice has been established, which advocates the prosecution of international pariahs and the leaders of recalcitrant states with no strong allies but allows the great powers to both protect themselves and their allies from the clutches of the Court. The Chapter now turns its attention to how institutions help bring about compliance with said rights and duties.

¹⁰⁸ This difference principle logic was applied to the field of international relations by Charles Beitz (see 1979b), Thomas Pogge (see 1989) and Thomas Scanlon (see 1973).

3.2.2 Institutions and Compliance

Kal Raustiala and Anne-Marie Slaughter defined compliance as: “a state of conformity or identity between an actor’s behavior and a specified rule” (2002: 539; see also Fisher, 1981: 20). These rules, however, need not be formal legal ones, they can also be customary ones or norms. For the ICC, the requirement of compliance arguably exists in two forms. On the one hand, in accordance with the principle of complementarity discussed above, the ICC framework affirms the reality that states hold the primary responsibility to investigate, prosecute and, if required, punish international crimes (see Schabas, 2011a; Stahn, 2011; Burke-White, 2008; Kleffner, 2008b; Benzing, 2003). There are arguably two ways in which this duty can be upheld: first, by the domestic system of the state on which the crimes occurred (see Du Plessis and Pete, 2004);¹⁰⁹ or second, by a third party state under the principle of universal jurisdiction (see Kaleck, 2009; Inazumi, 2005; Reydam, 2005; 2003; O’Keefe, 2004; Kissinger, 2001; Roth, 2001; Sunga, 1992). Although it should be noted that neither of these duties were particularly well upheld, thus perhaps establishing the need for a permanent international criminal court and a formal institutionalisation of the duty to pursue individual accountability for international crimes. On the other hand, in relation to the legal principle *pacta sunt servanda* (see Schmalenbach, 2012; Bassiouni, 1996a; Janis, 1988; Wehberg, 1959), the idea that legal agreements must be kept and a core feature of international law, states arguably have a duty to respect the legal commitments they have entered into, through virtue of their signing of the *Rome Statute*, by complying with ICC decisions and requests.¹¹⁰ In other words, states are expected to comply with their duty to

¹⁰⁹ Max Du Plessis and Stephen Pete argued that the main reason to establish a permanent international criminal court, and thus formalise the institution of international criminal justice, was to encourage states to comply with their duty to prosecute international crimes at the domestic level (see 2004: 15).

¹¹⁰ The principle of *pacta sunt servanda* in international law is enshrined in Article 26 of the *Vienna Convention on the Law of Treaties* (see UN, 1969: 11).

ensure that impunity for international crimes is eradicated by both investigating and prosecuting those responsible at the domestic level as well as enforcing the ICC's decisions and carrying out its requests.

Within the International Law and Relations literature, one way that compliance with both the positive and customary rules of international law can be facilitated is through the establishment of institutions or regimes (see Raustiala and Slaughter, 2002: 540). The idea that compliance can be improved through institutionalisation, a core element of the so-called regime theory, has both a functionalist rationale as well as a constructivist one (see Slaughter Burley, 1993: 220), both of which, as will be shown below, are applicable to the work of the ICC (see Fehl, 2004).¹¹¹ There are arguably three ways which institutionalising legal commitments can increase compliance: by increasing costs; by diffusing norms; and by closing legal obstacles.

First, Robert Keohane argued that institutions increase compliance by increasing the costs of non-compliance (see 1984: 89-92). This idea of increasing the cost of non-compliance is central to the working of the ICC with it being suggested that because the Court has the power to monitor situations, request information and, in the absence of domestic action, intervene and initiate criminal proceedings it may serve as an incentive for states to comply with their obligation to investigate and prosecute crimes domestically (see Reydams and Odermatt, 2012; Bjork and Goebertus, 2011; Clark, 2011; Stahn, 2011; 2008; Marshall, 2010; Kleffner, 2008b). Carsten Stahn (see 2011; 2008) and Katharine Marshall (see 2010) refer to this as the "carrot and stick" approach and, as explained by William Burke-White, the

¹¹¹ Interestingly, both Harold Koh (see 1997) and Friedrich Kratochwil (see 1989) distinguish compliance in instrumental terms, that is intended to avoid negative consequences or punishment, from compliance in normative terms, that which results from an internalisation of accepted forms and patterns of conduct.

rationale behind it is reflective of a cost-benefit analysis transaction: “where the sovereignty costs of international intervention outweigh the political and financial costs of domestic prosecution, the threat of ICC intervention may encourage domestic judicial systems to prosecute international crimes themselves” (2008: 70; see also Nouwen, 2013; Stahn, 2008).

Burke-White identified three potential costs that he argued could serve to encourage the domestic prosecution of international crimes: first, states lose the ability to shape the contours of the judicial process, in terms of crimes prosecuted and defendants tried; second, states lose the ability to control the publicity surrounding the trials, which could be useful for buttressing the own political interests of the governing authority; and finally, states may suffer reputational costs, or embarrassment, at the international level for failing to comply with international obligations (see 2008: 69-70). It is perhaps the last of these, relating to the possible reputation costs of being identified as a so-called “bad international citizen” (see Orend, 2006: 220; Williams, 2002a: 41), that is particularly pertinent with regards to ensuring state compliance before the ICC.¹¹² For example, Carsten Stahn argued that: “states are induced to comply with their obligations under the Statute and to carry out domestic investigations and prosecutions through threat and potential embarrassment resulting from public ICC scrutiny” (2008: 98; see also Reydam and Odermatt, 2012: 109; Burke-White, 2008: 70). Thus, it can be argued that institutions, and subsequently notions of justice, can help to increase state compliance with legal and moral rules by strengthening to possibility of reputational costs or embarrassment that stem from non-compliance.

¹¹² Reputation costs have been the subject of much discussion within the literature on compliance with institutions and international law (see Brewster, 2009; Guzman, 2008; Dai, 2002; Downs and Jones, 2002; Simmons, 2000; 1998; Mercer, 1996; Martin, 1993; Lipson, 1991).

Second, institutions can also be said to increase compliance with legal commitments and moral duties by institutionalising norms, or standardised patterns of behaviour, within international society so that they become internalised within a state's way of thinking (see Chayes and Chayes, 1995). This argument has a strong constructivist underpinning (see Checkel, 2005; Haas and Haas, 2002; Johnston, 2001; Wendt, 1995; Wendt and Duvall, 1989) and perhaps relates to Martha Finnemore and Kathryn Sikkink's "norm cycle" thesis, which details the manner in which norms are established, diffused and adopted within international relations to the extent that they then become vehicles for facilitating change in the actions of international actors, namely states (see 1998). Moreover, in earlier work, Finnemore suggested that international organisations, such as the ICC, which often embody broader formal institutions, can act as "teachers of norms" and thus influence the way that states perceive, and respond to, certain actions and policies (see 1993). In other words, institutions can bring about compliance by developing and diffusing norms to the extent that they become widely accepted and begin to alter the way that states behave.

Expanding this constructivist line of argument to the realm of individual accountability, Sikkink noted that the increase in the prosecutions for mass atrocity crimes since the end of the Cold War, for which the ICC has been partly responsible, has permeated the normative framework of international society and altered how states view notions of right and wrong within international relations; a phenomenon Sikkink termed the "justice cascade" (see 2011). Here, with the creation of two UNSC sponsored *ad hoc* tribunals,¹¹³ three hybrid tribunals¹¹⁴ and the ICC, it can be suggested that perhaps an anti-impunity norm is becoming

¹¹³ The international Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

¹¹⁴ The Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Special Tribunal for Lebanon (STL).

institutionalised within international society which is perhaps altering the way that international society responds to those individuals who commit international crimes (see Engle, 2015; Pensky, 2008). Therefore, by helping to develop and diffuse new norms within international society, and thus altering commonly held conceptions of right and wrong, institutions can be said to exert a social pressure to comply with international legal commitments and moral duties.

The final role of institutions in terms of compliance specifically relates to the ICC, but could be applied to other international legal organisations if applicable. When a state becomes party to the *Rome Statute* they are obligated to alter their own domestic laws so that they permit the ICC to have jurisdiction over their territory and so that there is no incompatibility between the *Rome Statute* and domestic legislation (see Megret, 2011; Schabas, 2011a: 196-197; Robinson, 2002: 1849; Oosterveld, Perry and McManus, 2001: 767). This could help increase compliance with the duty to prosecute international crimes domestically by removing the legal obstacles, such as insufficient substantive law, that Antonio Cassese argued often exist within national jurisdictions (see 2009: 124). Moreover, compliance could be further increased because, as noted by Kenneth Abbot, once these new legal principles have been given *de jure* recognition at the domestic level, the intuitive mind-set of legal professionals, namely judges and lawyers, means that it will become natural for them to begin to address international crimes within national judicial systems (see 1999). Thus, by obligating states to alter their own domestic legal systems to allow for the prosecution of international crimes, the institutionalisation of the principles of international criminal justice could, in theory at least, increase the compliance of states with the duty to prosecute these crimes internationally. It should be noted though that the strength of this reality's ability to breed compliance is tethered to how domestic legislations implement the

Rome Statute. However, there is no standard model that domestic ICC legislation should take with current ICC Acts ranging from being detailed and extensive, such as those in Australia, Canada, South Africa, Switzerland and the United Kingdom (UK) (see Triggs, 2010; Du Plessis and Pete, 2004; Oosterveld, Perry and McManus, 2001),¹¹⁵ to those which are extensively weak, particularly prominent amongst African states (see Du Plessis and Ford, 2008).

In short, it can be argued that institutions can help bring about compliance with legal commitments and moral duties in three ways: by increasing the costs, both physical and social, of non-compliance; by aiding in the diffusion of norms so that they become internalised and alter the behaviour of states; and by sometimes forcing states to alter their own domestic legislation and thus changing their behaviour at that level too. This is interesting for this thesis' discussion on justice because it alludes to the coercive power of notions of justice (see Blake, 2016; 2001; Valentini, 2011; Pevnick, 2008). In this discussion, we can see two examples of justice's coercive properties: physical coercion by establishing negative consequences connected to non-compliance, and normative coercion by altering the commonly held social conceptions of right and wrong. However, as will be suggested within Chapter Seven, the extent to which these coercive pressures of justice have actually altered the actions of states is debatable because compliance with both ICC decisions and requests as well as the duty to prosecute international crimes domestically arguably remains limited; perhaps meaning that the anti-impunity norm is not as widespread as imagined and/or that the physical costs of non-compliance are currently not higher than the benefits.¹¹⁶

¹¹⁵ In fact, the strength of South Africa's ICC Act was potentially an issue for the South African government following their decisions to not comply with the ICC's outstanding arrest warrant for Sudanese President Omar al-Bashir (see Tladi, 2015).

¹¹⁶ As will be argued in Section 7.2.2, the ICC's refusal to refer South Africa's non-compliance with their legal obligation to arrest Sudanese President Omar al-Bashir to the United Nations Security Council, is perhaps evidence of this lack of physical costs (see de Wet, 2017).

3.2.3 Summary

In sum, this Section has outlined the relationship between justice, society and institutions (social justice) as well as two of the primary roles institutions play within a society. This is important for this thesis because the observations made within this Section form part of the framework through which the compatibility of the ICC's purposes, procedures and stakeholder practices will be analysed in Chapters Five, Six and Seven. From this Section, there are three elements of the framework that have been identified. First, it was noted that Bull's notions of international and individual justice were most relevant to the ICC's operations, despite the Court purporting strong cosmopolitan features, meaning that it can be argued that states and individuals exist as the primary holders of rights and duties within both the ICC framework and international society more broadly. Second, it was argued that these rights and duties, held by states and individuals, are distributed in accordance with what Bull termed proportionate not arithmetical justice. The basis for this unequal distribution of rights and duties was Rawls' 'difference principle' which suggests that a distribution of rights and duties in accordance with capabilities and status is preferable to the more idealistic equal distribution when, and only when, it is intended to help bring about outcomes which serve the interests of all members of society, particularly the weakest and most vulnerable. Finally, it was suggested that justice, when embedded within formal institutions, exists as a coercive force, in both physical and normative terms, which can increase compliance with legal commitments and moral duties. It was argued that this increased compliance could be achieved in three primary ways: by increasing the political cost, in terms of societal reputation, connected to decisions of non-compliance; by developing, diffusing and institutionalising new international norms to the extent that they become internalised by states and alter how states view notions of right and wrong; and by encouraging and/or

obligating changes to domestic legislation and thus practices. Having discussed the relationship between justice, society and institutions (social justice), this thesis now turns its attention to the connection between justice and formal procedures (procedural justice).

3.3 Justice and Procedures: Procedural Justice

The theory that concerns itself with the efficacy and fairness of societal processes is called procedural justice. Lawrence Solum defined procedural justice as: “the conditions under which the application of the norms of corrective justice to particular cases is fair” (2004: 238). Solum’s linkage between notions of procedural justice and legal proceedings is a common feature of the academic literature (see Bottoms and Tankebe, 2012; Hollander-Blumoff and Tyler, 2011; Jenkins, 2011; Macdonald, 1980), with procedural justice often being associated with common law principles, including: due process (see Resnick, 1977; Scanlon, 1977), fundamental justice (see Evans, 1991) and natural justice (see Baxter, 1979). However, it should be noted that procedural justice also concerns itself with non-legal settings when some form of resolution regarding a distribution of resources is required (see Blader and Tyler, 2003; Tyler and Blader, 2000; Barrett-Howard and Tyler, 1986). For this thesis, procedural justice will be used to analyse the efficacy and fairness of the processes which guide the workings of the ICC, in this case: referrals, complementarity, gravity and cooperation.¹¹⁷ This thesis identifies four models of procedural justice, which determine whether a procedure can be said to be just: the accuracy model, the balancing model, the participation model, and the transparency model.¹¹⁸ The remainder of this Section will explore the four aforementioned models independently, so as to establish a framework

¹¹⁷ These will be discussed further in Chapter Six.

¹¹⁸ It should be noted that procedural justice concerns itself with formal procedures rather than the aspects of justice which focus on how decisions are made, such as impartiality and lawfulness, which are discussed in Section 3.4.

against which the justness of the ICC's procedures can be measured. However prior to this, the Section will first explore John Rawls' three types of procedural justice (see 1999b: 73-78).

3.3.1 John Rawls' Three Types of Procedural Justice

According to Rawls, procedural justice exists in three forms: perfect, imperfect and pure (see 1999b: 73-78). The first of these, perfect procedural justice, exists when "there is an independent standard for deciding which outcome is just and a procedure guaranteed to lead to it" (Rawls, 1999b: 74). From Rawls' explanation it can be argued that perfect procedural justice assumes two things: first, an objectively identifiable desired outcome; and second, a procedure that will accurately and consistently ensure that this outcome will be produced. To demonstrate perfect procedural justice, Rawls used the cake-cutting scenario whereby a group of people are tasked with dividing a cake so as they each receive an equal share (see 1999b: 74). Here, Rawls identified the desired outcome as being an equal share of the cake for all participants in the transaction and suggested that this outcome could be accurately achieved by employing a procedure whereby the person charged with cutting the cake is given the last slice (see 1999b: 74). According to Rawls, this procedure works because making the cutter pick last ensures that they will divide the cake as equally as possible so they do not get left with a significantly smaller slice (see 1999b: 74). However, in qualification of this principle, Rawls noted that: "pretty clearly, perfect procedural justice is rare, if not impossible, in cases of much practical interest" (1999b: 74).¹¹⁹

Moving on, Rawls defined his second type of procedural justice, imperfect procedural justice, as existing when although "there is an independent criterion for the correct outcome,

¹¹⁹ In fact, for reasons which will be discussed in Section 3.3.2, Lawrence Solum argued that "procedural perfection is unattainable" (2004: 185).

there is no feasible procedure which is sure to lead to it" (1999b: 75). Here again, Rawls' principle holds two characteristics: first, an objectively identifiable desired outcome; and second, no procedure through which this outcome can be accurately and consistently delivered. For Rawls, imperfect procedural justice is exemplified by the criminal justice system because although a desired outcome exists, those responsible for committing crimes get punished, it is "impossible to design the legal rules [or procedures] so that they always lead to the correct result" (1999b: 74-75). In defence of his suggestion, Rawls explained that criminal justice is an example of imperfect procedural justice because "even though the law is carefully followed, and the proceedings fairly and properly conducted, it may reach the wrong outcome. An innocent man may be found guilty, a guilty man may be set free. In such cases we speak of a miscarriage of justice" (1999b: 75). Therefore, imperfect procedural justice highlights a vagary insofar as it suggests that justice and injustice can coexist simultaneously. For example, during a criminal trial the process itself could be just if all the correct laws and provisions were followed but an incorrect decision could still be delivered which would make the outcome unjust.¹²⁰

Finally, Rawls argued that his third type of procedural justice, pure procedural justice, exists for arrangements where "there is no independent criteria for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed" (1999b: 75). This means that pure procedural justice is defined by a single characteristic, the process itself, because there is no objectively identifiable desirable outcome which will benefit all the concerned parties. To explain pure procedural justice, Rawls used the example of gambling (see 1999b: 75).

¹²⁰ The extent to which justice is defined by process or outcome is the topic of the discussions in Section 3.4.

According to Rawls, when stakeholders partake in a betting transaction there is no outcome which will be desirable for all parties involved because either the bookmaker or the gambler will end up losing (see 1999b: 75). As such, Rawls argued that the outcome is irrelevant when assessing the fairness of gambling transactions because justice is intrinsically linked to the process itself (see 1999b: 75). In short, within a pure procedural justice arrangement as long as the correct procedures are followed, such as those surrounding the placing and adjudicating of bets, then the outcomes that arise will always be considered just despite either the bookmaker or the gambler losing.

Thus, from the above discussion on Rawls' types of procedural justice it can be argued that the concept is complex, multi-faceted and exists in many forms (see also Johnston, 1994; Damaska, 1986). In particular, given that perfect procedural justice arrangements are rare, it is important to delineate whether the arrangement being discussed is considered to be an example of imperfect or pure procedural justice (see Rawls, 1999b: 75). This is because these arrangements purport a different understanding of how justice is measured. For example, if one applied the principles of pure procedural justice to a criminal trial, then the judgment rendered would be considered just so long as the correct procedures had been followed, regardless of whether the outcome was correct. Whereas, when a criminal trial is considered in relation to the principles of imperfect procedural justice, the judgment is considered just not only by virtue of the process followed but also by whether or not its substantive element, be that conviction or acquittal, was correct.

In light of this observation, it is important to note that the type of procedural justice most appropriate for this thesis' analysis of the ICC is imperfect procedural justice. There are three broad reasons why this thesis argues that the ICC's procedural framework is an example

of an imperfect procedural justice arrangement. First, the ICC conducts criminal trials so is relevant to Rawls' example of imperfect procedural justice discussed above. Second, this thesis is primarily concerned with procedures away from the trial process, such as complementarity, cooperation, gravity and referrals, which can also be considered examples of imperfect procedural justice because although objective desired outcomes can be arrived at, there remains no process that can guarantee a correct decision. Finally, whilst the ICC possesses an overarching goal, to end impunity, there remains no procedural mechanism that can guarantee that the Court can achieve this aim; thus, depicting it as an example of imperfect procedural justice. Having discussed Rawls' three types of procedural justice and related them to the ICC's framework, this thesis now turns its attention to the theoretical models used to judge when procedures are just; beginning with the accuracy model.

3.3.2 Accuracy Model

The accuracy model of procedural justice suggests that procedures should be measured entirely on their ability to produce accurate or correct outcomes. For instance, in the context of criminal litigation proceedings, Robert Bone argued that "the purpose of adjudication is to determine each party's rights accurately" (1993: 598). Similarly, but in relation to civil rather than criminal proceedings, Patrick Johnston measured a procedure as just in relation to the "success" it brought "in providing dispute-resolution participants what they think they are due" (see 1994: 833). In the context of the ICC, the accuracy model would depict the Court's procedures as being just in accordance with the extent to which they were able to consistently produce accurate outcomes. In other words, do the ICC's procedures achieve what they were intended to?

However, Solum highlighted two broader problems related to measuring the effectiveness of procedures in accordance with the accuracy of the outcomes they produce. First, Solum noted that accuracy itself is a contested concept that can be viewed from two perspectives: case accuracy, whether the outcome in a specific case was correct; and systemic accuracy, whether the procedure will produce the correct outcome in future cases (see 2004: 247). Solum argued that this was problematic because these two perspectives are not always compatible insofar as occasionally “the goals of case accuracy and systemic accuracy may conflict” with one another (see 2004: 250). Second, Solum purported that defining procedural effectiveness in terms of accuracy was problematic because it failed to recognise that “justice has a price” and that there comes a “point at which that price is not worth paying” (2004: 247). This reality was echoed by Bone who suggested that it was poor practice to suggest that notions of procedural justice be measured solely in terms of accuracy because of the reality that current justice systems tolerate “procedural error even when expensive procedures might reduce it” (1993: 599).

Therefore, because there is no agreement over how accuracy should be measured and at times accuracy is sacrificed in favour of cost, the usefulness of the accuracy model as a means for analysing whether procedures are just is debatable. Moreover, the standalone strength of the accuracy model becomes further diminished when Rawls’ observation that the majority of procedural justice arrangements are imperfect and therefore cannot guarantee the correct or accurate outcome all the time (see also Solum, 2004: 244-247).¹²¹ Nevertheless, because correct outcomes are desirable accuracy remains an important criterion for just procedures and as such should not be ignored as an overarching goal of

¹²¹ Lawrence Solum suggested that prioritising accuracy above any other criterion is troublesome because justice transactions do not take place in a “utopian ideal” (2004: 244).

procedural arrangements. In short, and as asserted by Solum, accuracy exists as a “component of an ideal of procedural justice, but it is not a candidate for a complete account of procedural justice” (2004: 252). Having outlined the strengths and weaknesses of the accuracy model of procedural justice, this thesis now turns its attention to the balancing model.

3.3.3 Balancing Model

The basis of the balancing model is that a procedure can be judged as just when it is designed in a manner that effectively weighs the benefits of accuracy against the cost of said accuracy being achieved (see Schebesta, 2014: 854; Solum, 2004: 252-259). For our discussion, the balancing model would purport that the ICC’s procedures be designed in a manner which effectively weighs the costs and benefits of achieving an accurate outcome. Moreover, it should be noted that, in an ICC context, any cost/benefit calculations not only need to measure costs in financial terms but also political ones, such as the loss of sovereignty (see Hafner-Burton, Mansfield and Pevehouse, 2015; Alter, 2008; Bradley and Kelley, 2008: 27-32; Abbott and Snidal, 2000: 436-441; Moravcsik, 2000: 227-228).

However, the extent to which the balancing model is a suitable measure of procedural effectiveness and fairness is debatable. One issue with the balancing model relate to these two questions which can be asked of it: when should accuracy be forfeited in favour of cost and how should the costs of procedural justice be distributed? Solum offered some possible answers to these questions by grounding the balancing model of procedural justice in the context of two broader notions of normative ethics. First, Solum outlined a consequentialist proposal where the benefits of accuracy were weighed against the costs of obtaining it and the option that would result in the best consequences, namely the highest levels of utility,

would be chosen (see 2004: 252-257). Second, Solum proposed a deontological defence which would emphasise right-based constraints on decision-making, particularly the nature and distribution of costs created (see 2004: 257-259).

However, Solum qualified this debate by suggesting that neither the consequentialist nor the deontological arguments were adequate for resolving cost-benefit vagaries underpinning the balancing procedural justice model. For Solum, the consequentialist justification was weak because it did not make decisions in accordance with widely shared societal values and is instead built in accordance with an amoral aim of maximising utility (see 2004: 256-257). Likewise, Solum argued that the deontological justification was problematic because not enough academic analysis has been conducted to determine if it is fit for purpose (see 2004: 258-259). These observations led Solum to remove the balancing model from his theory of procedural justice, although references to cost-benefit analysis do remain in his principles (see 2004: 259). Nevertheless, this thesis would not go as far as to discredit the balancing model as a means for analysing procedural effectiveness because it would appear clear that cost/benefit judgments do feature in justice decisions at both the domestic and international level (see Abrams, 2013; Starr, 2013; Rosenberg and Mark, 2011; Brown, 2004; Roman, 2004). For example, those discussions raising concerns about, or sometimes even criticising, the cost of international criminal justice are often grounded in a cost/benefit narrative (see Davenport, 2014; BBC News, 2012b; Skillbeck, 2008; Wippman, 2006). Instead, this thesis would argue that, as it did with the accuracy model, cost/benefit analysis should be considered as an integral part of any analytical framework built on notions of procedural justice. Having discussed the vagaries of the balancing model of procedural justice, this thesis now turns its attention to the participation model.

3.3.4 Participation Model

According to Solum, the participation model holds that procedures are effective and fair when “those affected by a decision have the option to participate in the process by which the decision is made” (Solum, 2004: 259; see also Saliternik, 2016: 623-624; Stewart, 2014: 213-214; Guinier, 1991: 1489-1513). Discussions on the relationship between participation and procedural justice can be narrowed to concern two questions: who can participate and how do they do so? Concerning the matter of who can participate, Michal Saliternik distinguished between open and closed levels of participation, with open participation allowing the direct involvement of any party with an interest in proceedings, whereas, closed participation narrows this so that only those stakeholders directly affected by the matter being discussed are allowed to participate (see 2016: 623). Moving on to the question of how parties can participate, Richard Stewart differentiated between decisional and non-decisional participation, with decisional participation allowing participants to directly influence the outcome of proceedings, often by awarding them a vote on the final decision, whereas non-decisional participation are directly involved in the proceedings but have no final say over the outcome (see 2014: 213-214). In terms of the ideal system of participation, directly referring to Stewart’s work, Saliternik preferenced a closed/decisional model of participation as the means for best ensuring that stakeholder interests and rights are promoted and respected (see 2016: 623). However, Saliternik did qualify this by stating that although not ideal, an open/non-decisional participatory system is better than no participation at all (see 2016: 623).

Now, Saliternik’s qualification perhaps highlights the importance of stakeholder participation in meeting the demands of procedural justice but this thesis disagrees with Saliternik’s suggestion that open participation is suitable for justice transactions. The basis of

this disagreement is centred on the suggestion that open participation may challenge the integrity of the process by allowing indirect stakeholders the opportunity to use proceedings as a platform on which to promote their own agendas. This is important in the context of the ICC because allowing open participation could provide critical states, regional/international organisations and/or victim groups with the ability to further criticise the Court's proceedings and practice; a reality that would perhaps fail to meet the liberal notion that justice efforts should serve the interests of the weakest members within a transaction. Furthermore, this thesis agrees with both Saliternik (see 2016: 623-624) and Stewart's (see 2014: 213-214) preference of decisional participation but also considers non-decisional participation as a suitable replacement.

As such, this thesis would argue that closed/decisional participation is most desirable for justice transactions not only before the ICC but in other situations as well because it can help in ensuring the purity of proceedings. This said, closed/non-decisional would be a suitable alternative if logistics prevent decisional participation from occurring. In the context of the ICC, the participation framework is reflective of a closed/non-decisional system. Participation before the ICC can be considered closed because only stakeholders directly affected by proceedings, usually a combination of the prosecution, defence, state representatives and victim representatives, can take part. Moreover, participation in ICC proceedings can be classed as non-decisional because the aforementioned stakeholders do not have a say in the final outcome, this is instead made by a panel of judges who base their decision in accordance with the evidence and arguments provided during the proceedings heard.

Now, the above discussions from Saliternik and Stewart provide a strong context for understanding participation within justice transactions as well as highlight the importance of participation within procedural justice. However, interestingly neither Saliternik nor Stewart give any reasons as to why stakeholder participation enriches the search for procedural justice. Solum addressed the issue of why participation is an important element of a just procedural arrangement through four separate explanations, the gaming interpretation, the dignity interpretation, the satisfaction interpretation and the discourse theory interpretation (see 2004: 259-273). But, as highlighted by Solum, only two of these explanations, the dignity and satisfaction interpretation, are relevant to criminal proceedings and subsequently the workings of the ICC (see 2004: 260-272). Moreover, Solum does acknowledge that no one of these interpretations is a standalone explanation, instead they combine to provide a defence of participation as an important requirement for procedural justice (see 2004: 272-273). The remainder of this Section will define the dignity and satisfaction interpretations in order to defend the important role held by participation within justice transactions.

According to Solum, the dignity interpretation's defence of participation within justice transactions is best articulated through the maxim: "everyone is entitled to their day in court" (see 2004: 262). Underpinning the dignity interpretation is the argument that the ability to participate in legal proceedings that directly affect an individual is a right and that being allowed to have their story heard ensures that the stakeholders are treated with dignity (see Bone, 1993). Furthermore, Jerry Mashaw argued that stakeholder participation ensures the sanctity of due process clauses which in turn fulfils an individual's desire to feel that they were treated with dignity and fairly by the process, regardless of the outcome (see 1985). However, Solum critiques the dignity interpretation on the grounds that, because criminal proceedings are an example of what Rawls called imperfect procedural justice, participation alone cannot

define a process as being just because the accuracy of the outcome trumps the sanctity of the process (see 2004: 264). This thesis disagrees with Solum though because it would argue that, although related, processes and outcomes should be considered mutually dependent on one another, with one not given preference. In other words, a process can be considered just even if it results in an undesirable, or even unjust, outcome. In short, a just process must allow for stakeholder participation because of their right to participate in proceedings that directly affect them.

Moving on to the satisfaction interpretation, Solum highlighted that studies in social psychology (see Tyler, 2006; Gibson, 1989; Lind and Tyler, 1988; Barrett-Howard and Tyler, 1986; Thibaut and Walker, 1975) have argued that: “a process that provides participants an opportunity to tell their stories and make litigation decisions may be most satisfactory to participants” (2004: 264). Here, in contrast to the dignity interpretation which viewed participation as a right, the satisfaction interpretation considers participation in instrumental terms inasmuch as participation is used as a tool to boost the stakeholders’ acceptance of outcomes. However, as with the dignity interpretation, Solum criticises the satisfactory interpretation on the basis that participation cannot be distinguished from other variables, such as accuracy, benefit or cost, which all impact on a stakeholder’s satisfaction with a process (see 2004: 266-267). But, again Solum perhaps places too much emphasis on outcomes of processes rather than the process itself. Although Solum is correct in asserting that participation is not the sole determiner of satisfaction, the ability to be involved in the process that renders a decision can impact on a stakeholder’s satisfaction with said process. As such, a just process is one that allows for stakeholder participation because by doing so the legitimacy and acceptance of the outcome may be bolstered on the basis that the process by which it was delivered is considered just.

Therefore, despite their apparent standalone weaknesses, the dignity and satisfaction interpretations combine to provide a strong argument in favour of participation existing as a core requirement for procedural justice. However, there is an issue with the aforementioned interpretations insofar as they assume a situation where participation would freely occur if the opportunity was available and as such fail to consider the alternative situation where stakeholders are unwilling or unable to participate. Within the literature on participation's requirement for procedural justice, there is no indication as to whether all affected stakeholders have to participate in order for the process to be just or whether the opportunity to participate is sufficient, although given the emphasis placed on participation it is likely that the former can be inferred. With regards to participation in general and within an ICC context, this thesis would disagree with this inference about physical participation being required. On a general level, physically forcing a stakeholder to participate in proceedings, possibly against their will, could risk reversing the satisfaction and dignity benefits discussed above. Obviously, exceptions must be made with regards to witnesses who can be subpoenaed to appear for the good of the process. Furthermore, in the context of the ICC, having physical participation from all stakeholders is problematic because of the fact that proceedings are often conducted thousands of miles from where the crimes took place. This poses a logistical problem for some stakeholders, particularly victims, with regards to their ability to travel to The Hague to participate. Thus, this thesis would argue that, due to the logistical issues surrounding participation in proceedings before the ICC and the problematic practice of forcing stakeholders to participate against their will, this thesis will argue that a just procedure is one which allows stakeholders the ability to participate if they are able and/or willing to do so.

In short, the participation model of procedural justice is perhaps the most encompassing and convincing single model for measuring the effectiveness and fairness of

procedures, and as such the ICC's procedures should be evaluated in accordance with the extent to which they allow for adequate stakeholder participation. However, as with the accuracy and balancing models, stakeholder participation alone cannot be considered synonymous with a just procedure. Instead, participation can be considered part of a broader framework through which procedural arrangements can be considered just.

3.3.5 Transparency Model

The transparency model of procedural justice holds that just procedures are those which ensure that relevant information is clearly provided for all interested parties. Steven Roach defined transparency as: "the exchange of information which conditions the (growth of) knowledge and awareness of the institution's goals, rules and tasks" (2006: 45; see also Peters, 2015: 4; Bianchi, 2013). Within justice transactions, transparency concerns aspects of both procedure, how procedures operate, and outcomes, why certain decisions were made (see Saliternik, 2016: 623-624; Schafer, 2013: 133).¹²² Now, transparency is an important element pertaining to the ICC, a suggestion perhaps affirmed by the attention it has been given within the academic literature (see Stegmiller, 2013; 2011; Keller, 2013; deGuzman, 2012a; 2009; Wegner, 2011; Roach, 2006: 45; Danner, 2003). But, procedural transparency is more pertinent for a discussion on the ICC because there is arguably more controversy that surrounds the Court's decisions, or the outcomes, regardless of how transparent they are.¹²³

As a general caveat, it should be noted that complete transparency, for all procedures, is unrealistic (see Stewart, 2014: 258-261; Schaeffer, 2013: 133). This is because the

¹²² Michal Saliternik distinguishes this by referring to procedure transparency as transparency and outcome transparency as reason-giving (see 2016: 623-624).

¹²³ Following Margaret deGuzman (see 2012a: 289-291), this is the reason why this thesis would argue that consistency between the ICC's decisions is considered more important for compatibility with justice, and subsequently broader legitimacy, than transparency.

purported benefits of transparency are sometimes overridden by the countervailing demands of issues, such as privacy and security, which could suggest that transparency is not a necessary requirement of a just process (see Peters, 2015: 9; Stewart, 2014: 258-261; Schaeffer, 2013: 133). But, in defence of the transparency model, it is important to acknowledge that complete transparency is actually not viewed by the model as a necessary feature. Instead, the primary goal is to remove notions of formal and/or intentional opacity because this is tantamount to an unjust procedure.

Nonetheless, this thesis has found that issues pertaining to procedural transparency were limited, if not non-existent, in its analysis. In general, the ICC can be considered very transparent, it includes many documents and resources on its website for public access and others, if security allows, can be requested from the Court directly (see Neumann and Simma, 2013: 473-476).¹²⁴ However, one potential issue may be that these sources of information are only accessible to experts because they are very complex and technical. Moreover, the author is unsure about how decisions are explained in affected communities where access to the internet may be limited but where transparency is perhaps most needed. This said, although it is perhaps not that pertinent for this discussion, transparency remains an integral component of procedural justice. However, as with the accuracy, balancing and participation models discussed previously, transparency stands as part of what defines a process as being just not a sole measure.

¹²⁴ Thore Neumann and Bruno Simma refer to this distinction as proactive and reactive procedural transparency (see 2013: 473-476).

3.3.6 Summary

In sum, this Section has outlined four models through which formal procedures can be classed as just. This is important for this thesis because these models form part of the framework through which the compatibility of the ICC's procedures with the demands of justice will be analysed in Chapter Six. The theoretical framework for this thesis includes the demands of the four models of procedural justice outlined within this Section. First, the accuracy model depicts that the ICC's procedures should be designed in a way that ensures they are able to achieve the Court's objectives as accurately as possible. Second, and qualifying the demands of the accuracy model, the balancing model acknowledges that in order to be considered just the ICC's procedures will have to ensure that the costs, both financial and political, of attaining accuracy are not disproportionately higher than the benefits said accuracy will bring. Third, the participation model demands that the ICC's procedures allow the opportunity for stakeholders, identified as those actors directly affected by the proceedings, to participate in said proceedings if they are willing to do so. Finally, the transparency model recognises that the ICC's procedures should strive to be as transparent as possible in order to broaden general levels of understanding and allow for external scrutiny and review.

However, as discussed within the Section, no one of these models is strong enough to constitute fulfilling the demands of procedural justice in their own right. Instead, the requirements of each model combine to bring forth a set of desirable factors that all procedures should be aiming to achieve. Thus, this thesis will argue that in order to be considered just, the ICC's procedures need not meet the demands of all the models discussed, only be designed in a way that attempts to meet some of them. Moreover, as will be highlighted in Chapter Six, the ICC's procedures may have limitations but the existence of these do not translate to the procedures being considered unjust. This is because the ICC's

procedural framework is reflective of what Rawls called an imperfect procedural justice system whereby no procedure can guarantee the pre-identified desirable end result and as such processes can always be improved so that they attempt to improve their fulfilment of one or more of the aforementioned models. Having discussed the relationship between formal procedures and justice, this thesis now turns its attention to the ways through which decisions/actions can be considered just.

3.4 Justice and Decisions/Actions

Measuring the extent to which decisions/actions can be considered just is a difficult proposition, not least because there is no agreement as to how justice should be identified. Quite often discussions on measuring just decisions/actions are divided between whether or not justice should be determined in terms of the outcomes produced or the process through which decisions were made (see Aiken and Wizner, 2013; Lucas, 2009; Tyler, 2000; 1997: 75-102; Landis and Goodstein, 1986; Sadurski, 1984). However, such a division is somewhat problematic because it fails to acknowledge the relationship that exists between the two methods. This thesis would argue that measuring justice cannot be narrowed to either outcome or process because outcomes are important because they are the tangible facet that stakeholders, and external observers, see but it is through correct or just decision-making processes that these outcomes gain societal acceptance and the required degrees of legitimacy. As such, this thesis will argue that decisions/actions cannot be considered just solely in terms of matters of outcomes or process; although, as will be argued in Chapters Five, Six and Seven, many of the debates and issues surrounding the ICC's purposes, procedures and stakeholder practices continue to play out this outcome/process dichotomy.

Moreover, scholars and students of ethics will find this outcome/process debate familiar inasmuch as it closely resembles the one between deontological and consequentialist depictions of normative ethics (see Tanner, Medin and Iliev, 2008; Singer, 1993). Building on this seemingly close relationship with debates within normative ethics, this thesis would add a third method through which decisions/actions can be considered just: the virtues held by the decision-makers. This argument directly corresponds to the third field of normative ethics (see Singer, 1993), virtue ethics, which, despite being a prominent feature of both Aristotle (350BCE:2009: 23-79) and Plato's (380BCE:2007: 112-176) original theories of justice, appears to be surprisingly absent from discussions relating to measuring justice. As such, this thesis will include what it terms virtue justice, relating directly to the virtues displayed by decision-makers, as a means for assessing whether or not decisions/actions are considered just. In short, this thesis argues that decisions/actions can be considered just in relation to a combination of outcomes, process and virtues but recognises that there is a complex interrelationship that exists between them. The remainder of this Section will be dedicated to outlining some of the requirements of justice in terms of outcomes, processes and virtues.

3.4.1 Justice as Outcome: Desert

When justice is defined in terms of desert it involves a transaction whereby an outcome is arrived at because an agent or situation is more deserving of attention and/or resources than another (see Hospers, 1996: 433; Nielsen, 1984: 104). The concept of desert is at the heart of many theoretical discussions on justice, with differences being drawn not only over how desert can be measured but also how important it is for defining decisions/actions as being just (see Rawls, 1999b; Hospers, 1996; Feldman, 1995a; 1995b; Scanlon, 1986; Nielsen, 1984; Lucas, 1980; 1972; Montague, 1980; Feinberg, 1974; Feinberg, 1970; Kleinig, 1973; 1971; Slote, 1973). However, this thesis is not concerned with the theoretical vagaries regarding

how desert is measured or how important it is to our understandings of justice because it instead focuses on what discussions of desert tell us about the nature of the broader concept of justice. As such, this thesis feels it is suffice to say, based on the plethora of academic discussions surrounding the relationship between the two concepts, that notions of desert and justice are intrinsically linked with regards to distribution transactions. This said, it is important to briefly outline the basis of desert in order to contextualise the concept.

Within their theoretical discussions on the concept, John Kleinig (1971: 71-76), Joel Feinberg (1970: 55-61) and Brian Barry (1963: 106-108) all allude to varying ways that desert can be understood. However, from these discussions it can be determined that transactions relating to desert claims consist of three components.¹²⁵ First, there is a subject that can lay claim to be deserving of something. Second, there is an object, physical or otherwise, that the aforementioned subject claims to be deserved of. Finally, there must be a reason why a subject is deserving of said object and this must be on the basis of something that has been done or occurred. However, in addition to these three criteria, there must also be a degree of responsibility that can be claimed by, or accredited to, the concerned subject (see Cupit, 1996; see also Rawls, 1999b: 89; Kleinig, 1971: 59; Feinberg, 1970: 72). For example, desert claims should not be grounded on the basis of actions conducted, or the virtues held, by another. Similarly, desert demands that a subject should not be punished for a crime that they did not commit. In other words, the subject must be directly responsible for the basis upon which they are making their desert claim. In sum, from this discussion it can be argued that desert claims and transactions are based on the following formula:

¹²⁵ It should be noted that although here these components are referred to singular terms, it is possible for them to exist in plural terms as well.

X (a subject) deserves Y (an object) because they are directly responsible for Z (a reason).

Moreover, it would appear that notions of justice as desert concern the distribution of attention and/or resources to an agent or situation that is most deserving of them, a decision that is arrived at for a particular reason.

In the context of this thesis' discussion on the ICC, the aforementioned relationship between justice and desert is important because it highlights that justice is, by nature, a selective concept. Notions of justice involve selecting the most deserving of attention and/or resources from a set of competing claims and it is on the basis of theoretical conceptions of what justice is which determines the decisions made. This inherent selectivity of justice, in terms of decision-making, is perhaps best illustrated by Sen's 'flute analogy' (see 2009: 12-15). The 'flute analogy' begins with one flute and three children, Anne, Bob and Carla, all of whom offer competing reasons as to why they deserve the flute. Anne's claim to the flute is based on the fact that she is the only one of the three children that can play it (see Sen, 2009: 13). Conversely, Bob's claim to the flute is based on the fact that his family is the poorest and he has no toys of his own (see Sen, 2009: 13). Finally, Carla's claim to the flute is based on the fact that she made the flute and should be able to enjoy the fruits of her labour (see Sen, 2009: 13).¹²⁶ Now, if heard independent of one another, each child has a compelling case for the flute but when they are considered together the just distribution becomes more complicated. According to Sen, different theories of justice would all proclaim that a different

¹²⁶ In order for Carla's claim to the flute to be valid, and for the analogy to work, two caveats need to be outlined. First, the analogy only works if one accepts that Carla is not the owner of the flute, despite making it, because the conflict would not exist if Carla owned the flute because Carla's decision would be final. Second, for Carla's claim to be valid we have to assume that she received no prior payment for producing the flute, else her desert claim will be voided because she has already received a benefit for making the flute.

child was most deserving of the flute and that the only real way to arrive at a truly just outcome would be to cut the flute in three; although in reality this would result in none of the children receiving a working flute (see 2009: 12-15).

In short, Sen's analogy shows that justice transactions often involve making a subjective choice as to what is a right or wrong distribution of attention, goods and/or resources. This is interesting because such an argument, regarding the inherent selectivity of the ICC, seems to stand in opposition to the following statement by current Chief Prosecutor Fatou Bensouda made during her inauguration speech in June 2012: "justice, real justice, is not a pick-and-choose system" (see 2012: 2). Moreover, this observation is of further importance for this thesis because it suggests that universal condemnation of selectivity by the ICC may be unfounded on the basis that because the Court's work concerns notions of justice it will be selective by nature. This means that perhaps the more pressing question would be not is the ICC being selective but how is it being selective? Sen's analogy also highlights the idea that there is no universally accepted definition or measure of what is a just decision when it comes to competing claims of desert. Instead, because there are a number of theoretical outlooks that offer their own specific vision of justice, in a situation where competing claims to desert are offered, a just distribution of attention, goods and/or resources will be subjective and context specific inasmuch as it will be determined by the criteria used to make said decision.

In the case of the ICC, desert, in terms of the situations most deserving of the Court's attention and resources, is measured in accordance with three considerations: complementarity, gravity and the interests of justice, which are considered in this order. Complementarity, discussed in more detail in Section 6.3, identifies deserving situations as

those where a state is unable or unwilling to adhere to its duty of investigating and prosecuting international crimes committed on their territory and/or by their nationals. Once the complementarity requirement has been sufficed, desert is then determined in terms of gravity, discussed further in Sections 5.3 and 6.4, whereby the ICC will select those situations where the most serious violations of the crimes within its jurisdiction have been committed (see ICC, 2011b: 1 and 13). Furthermore, as will be discussed in Section 5.3, the ICC's mandate is to focus on prosecuting those in high-ranking capacities, considered to be most responsible for the commission of international crimes (see ICC, 2013a: 13); thus, suggesting that in the ICC's eyes, the high-ranking, decision-making officials are more deserving of prosecution by the Court than lower-level direct perpetrators. Finally, once both the complementarity and gravity requirements have been fulfilled, desert will be further measured in accordance with the 'Interests of Justice' principle (see ICC, 2007a), whereby the focus will be on those situations where ICC involvement will buttress not hinder the interests of justice.

In sum, notions of justice are inherently selective insofar as they involve choosing where to distribute attention, goods and/or resources in situations where there are a number of subjects with competing claims of desert. Furthermore, it can be argued that the levels of selectivity are perhaps higher and more controversial within the international criminal justice system because, due to jurisdictional and resource limitations, the regime is perhaps required to be even more selective as to where it can investigate and prosecute (see Cryer, 2005a). For the ICC, it can be argued that the criteria for selecting the situations most deserving of the ICC's attention and resources is threefold: first, when the state under examination is unable or unwilling to pursue justice for international crimes themselves; second, when the crimes that have allegedly been committed are considered to be of a high-enough gravity to warrant international action; and finally, the situations where ICC led investigations and prosecutions

will best serve the interests of justice. Having outlined the relationship between justice and desert, this thesis now turns its attention to the one between justice and consistency.

3.4.2 Justice as Outcome: Consistency

There is much coverage of the relationship between notions of justice and the requirement of consistency (see German, Fortin and Read, 2016; Maiese, 2013; Folger, Sheppard and Buttram, 1995; Tyler, 1988). Furthermore, with regards to the outcomes of justice transactions, consistency is one of the oldest features used to measure whether or not a decision/action can be considered just. For instance, Aristotle suggested that formal justice requires like situations to be treated alike, and unlike situations to be treated unlike (see 350BCE:2009: 84-85; 350BCE:1992: 195 and 207). Here, we can infer the notion of justice as consistency because Aristotle would consider decisions/actions to be unjust if they responded to situations that were different to one another in the same manner. In other words, a just decision/action can be said to be one which produces outcomes that are consistent with previous decisions/actions. One of the clearest examples of this notion of justice as consistency can be seen within criminal justice systems. For example, the legal principle of *stare decisis*, the policy whereby courts are bound by their previous decisions, demands consistency between judgments (see Peters, 1996; Lyons, 1985; 1984). Likewise, the criminal justice system is also built on a principle that demands consistency between sentences (see Krasnostein and Freiberg, 2013; Spigelman, 2008; Bagaric, 2000).

In short, it can be considered that consistency with previous decisions/actions is an important measure as whether or not current decisions/actions are just. Robert Folger, Blair Sheppard and Robert Buttram defended the notion of justice as consistency when they argued that: “the distinction of some versus others should reflect genuine aspects of personal

identity rather than extraneous features of the differentiating mechanism itself” (1995: 272). In other words, any differences and similarities in decisions/actions should be because the context of the justice transactions are different or the same, not because of any other mitigating circumstances. Here, it can be argued that measuring consistency requires a set of pre-defined variables upon which the consistency judgment is made. However, more often than not this criteria cannot be objectively identified and thus, because it is subjective for the analyst, it is important for analysts to define the criteria that will be used so that any consistencies or inconsistencies can be highlighted and understood. Moreover, it should be noted that consistency does not demand that contextual situations be identical to one another just that there is a basic similarity, such as the type of crime or crimes committed.

Thus, in the context of analysing the decisions/actions of the ICC, it can be argued that consistency is an important consideration. However, unlike domestic criminal justice systems, the international criminal justice system before the ICC is less concerned with the consistency of judgments because the *stare decisis* principle does not exist (see Borda, 2013; Guillaume, 2011; Miller, 2002).¹²⁷ Furthermore, neither of the sentence specific elements of the *Rome Statute*, Articles 76 and 78 (see ICC, 2011b: 49-50), nor the *Rules of Procedure and Evidence*, Rule 145 (see ICC, 2013b: 55), mention the demand for consistency between sentences; although it is plausible that such consistency can be implied as existing. Instead, this thesis would argue that consistency is most important for the ICC with regards to its decisions/actions relating to the selection of situations for investigation, not least because of the inherent selectivity involved in the pursuit of international criminal justice noted in Section 3.4.1. For this thesis, there are arguably two primary areas where the ICC needs to

¹²⁷ Article 21(2) of the *Rome Statute* states that “the Court may apply principles and rules of law as interpreted in previous decisions” rather than it will or should (see ICC, 2011b: 17).

display consistency: first, in relation to the gravity of situations selected because the ICC's mandate is to investigate and prosecute the situations where the most serious violations of international criminal law have occurred;¹²⁸ and second, with regards to the length of time situations spend under Preliminary Examination before being dismissed or transferred to Full Investigation. These areas of contextual consistency are important because, as will be argued in Chapter Seven, gravity thresholds and Preliminary Examination timeframes can be easily compared and any inconsistencies in application could be used to highlight the unfair selectivity that exists in the administration of international criminal justice (see Poes, 2017; Smeulers, Weerdesteijn and Hola, 2015).

In sum, notions of justice demand that decisions/actions produce outcomes that are consistent with those produced by earlier decisions/actions. Here, consistency means that any differences in treatment exists because the context of the situation is different rather than for any extenuating reason. For the ICC, consistency relates primarily to the selection of situations and is inherently important because of the high-levels of selectivity involved with the pursuit of international criminal justice. It can be argued that the areas of the ICC's operation where consistency is most important are twofold: first, in terms of the gravity of situations selected for investigation; and second, the length of time situations spend the the Preliminary Examination stage. Having outlined the relationship between justice and consistency, this thesis now turns its attention away from justice identified as outcomes onto justice identified in terms of process, with an initial focus on the relationship between justice and impartiality.

¹²⁸ How gravity is and should be measured by the ICC will be further discussed in Section 6.4.

3.4.3 Justice as Process: Impartiality

When questions of justice are considered, perhaps one of the primary ideas that comes to mind is impartiality.¹²⁹ Discussions on justice are often dominated by claims demanding impartiality, as shown by John Rawls's depiction of it as "an essential, or even the essential, quality of a moral rule" (see 1996: 382). The importance of notions of impartiality for justice was also identified by John Stuart Mill who identified impartiality as the "first of judicial virtues... [and] a necessary condition of the fulfilment of other obligations of justice" (2008: 198). Finally, Sen suggested that any discussion on justice "will incorporate some basic demands of impartiality, which are integral parts of the idea of justice and injustice" (2009: 42). But, despite this seemingly close link, questions remain as to what impartiality means, how it can be achieved and why it is important?

Impartiality is one of those concepts that is recognisable but difficult to specifically define. Generally speaking, impartiality relates to the influences that do, and should, impact on decision-making processes. According to Mill, impartiality requires that decisions be "exclusively influenced by the considerations which it is supposed ought to influence the particular case in hand" and that any underlying ulterior motives or influences be resisted (see 2008: 180). Echoing Mill's definition, Bernard Gert explained impartiality thusly: "A is impartial in respect R with regard to group G if and only if A's actions in respect R are not influenced at all by which member(s) of G benefit or are harmed by these actions" (1995: 104). In other words, impartiality can be said to demand that decisions/actions are made on

¹²⁹ In fact, the title of Brian Barry's book, *Justice as Impartiality* (see 1995), suggests an almost inseparable, synonymous relationship between the two concepts.

the basis of a seemingly correct and objective criteria so that they are not influenced by issues of favouritism.

The perceived issue with decisions/actions being influenced by matters of favouritism was outlined by Sen when he argued that: “selective inclusion on an arbitrary basis in a favoured category – among those whose interests matter or voices count – would be an expression of bias” (Sen, 2009: 117). Here, Sen is perhaps suggesting that impartial decisions/actions are those which are neither biased nor intended to buttress self-interest. In fact, this proposed relationship between impartiality, bias and self-interest is a mainstay of the academic literature. For instance, Rawls outlined how “impartiality prevents distortions of bias and self-interest” (1999b: 163) before going on to suggest that an impartial person is “one whose situation and character enable him to judge in accordance with these principles without bias or prejudice” (Rawls, 1999b: 165).¹³⁰ Similarly, Brian Barry asserted that: “roughly speaking, behaving impartially... means not being motivated by private considerations” (1995: 11). Finally, Kaisa Herne and Tarja Mård suggested that: “an impartial justification asks people to imagine what principles of morality they would select if put in an impartial position where they cannot promote their own interests. Instead, they are assumed to promote the general interest which, in turn, is considered to support justice” (Herne and Mård, 2008: 29).

On face value, and recalling part of the discussion from Section 3.1.1, the fact that impartiality is a means for ensuring that self-interest is removed from decision-making is important because acting in the interest of others, not on the basis of self-interest, was

¹³⁰ Rawls’ mention of character here, perhaps justifies this thesis’ decision to include justice as individual virtue as one of its core principles.

identified as a core feature of a liberal conception of justice. However, there are perhaps two more nuanced reasons as to why impartiality is an important concept in the search for justice. The first reason relates to the way in which unequal power structures can influence the decision-making process and the extent to which an agent's material or historical advantages should not influence the decision-making process and enable them to get their own way (see Rawls, 2001; 1999b; Barry, 1995; Buchanan, 1975; Nozick, 1974). In other words, impartiality is required to act as a check on the decision-making process so as to ensure that the interests of the majority, not the powerful, are promoted and that matters of desert not power take precedent within justice transactions. This is particularly important for a discussion on international relations given Section 3.2.1's observation that international society is hierarchically structured and underpinned by unequal power structures. Contrastingly, the second reason relates to the argument that impartiality ensures the universalizability of justice outcomes (see Kant, 1785:2012; Finnis, 2005; Kane, 1996). This observation is important for this thesis because it suggests that impartiality is a means through which consistent outcomes can be produced; a requirement of just decisions/actions outlined previously in Section 3.4.2.

In short, by placing checks on the extent to which agents can pursue their own interests, it can be suggested that notions of impartiality form a core component with regards to ensuring that just outcomes are produced and possess a degree of societal acceptance. This suggestion is interesting because it posits the idea of impartiality in instrumental terms rather than as a goal in itself (see Mill, 2008: 180). This means that impartiality is not synonymous with justice but instead making decisions impartially is a means through which just outcomes can be produced. Recognising that impartiality does not necessarily define justice is important because it is perceivable that an agent could make a decision impartially

but not act justly. For example, if the UNSC simply refused to refer any situations to the ICC they could be said to be acting impartially but not justly. Moreover, this instrumental vision of impartiality is further important because it appears to affirm the suggestion made in the introduction to this Section that notions of justice as outcome and justice as process are intrinsically linked. Nevertheless, even though impartiality is not defining of justice in itself it is still important to note that making decisions impartially, insofar as they were influenced by the correct factors, is an important component for ensuring that they are just.

In the context of the ICC, impartiality is important in relation to stakeholder decisions because being perceived to have acted impartially is one way that external criticism can be avoided.¹³¹ Impartiality is thus important for a number of areas of stakeholder interactions with the ICC, particularly the areas of situation selection, referrals and cooperation as will be discussed in Chapter Seven. Moreover, showing that decisions were made impartially is perhaps more important for the Office of the Prosecutor (OTP) given its highly selective mandate and the allegations of an African bias it faces. In fact, critics of the OTP often support their concerns about the Prosecutor's alleged unfair selectivity by claiming they are showing a lack of impartiality (see VOA, 2016; Evans, 2016; Chaulia, 2013). In other words, they accredit impartiality with a lack of selectivity. For this thesis, this practice is problematic because, as identified in Section 3.4.1, all notions of justice are selective regardless of if they were rendered impartially or not. This means that it is possible to be both impartial and selective. For example, if the OTP can defend the decisions they make in accordance with the criteria that guide the selection process then they can be argued to having acted impartially

¹³¹ The importance of impartiality before the ICC is perhaps further affirmed by the number of times it is directly referenced within the Court's core documents. The terms impartial, impartially or impartiality appear: 11 times in the *Rome Statute*; nine times in the *Rules of Procedure and Evidence*; seven times in the *Code of Judicial Ethics* as well as Article 4 being dedicated to it; and once in the *Regulations of the Office of the Prosecutor*.

but selectively.¹³² Thus, it is important to note that impartiality cannot remove the selectivity of justice, nor is it intended to, it can only give societal acceptance to the selections made. Moreover, being seen to be acting impartially is perhaps the most important factor of the OTP's selection practice and other stakeholder's referral practice because the inherent selectivity of the ICC's mandate leaves it vulnerable for criticism.

However, despite its importance for notions of justice, identifying when and how an agent has acted impartially is difficult and debated. According to Sen, there are two forms of impartiality, open and closed, which concern the manner in which decisions are made within a group setting (Sen, 2009: 123-152; see also 2002). Open impartiality, as Sen explained, depicts that: "the procedure of making impartial assessments can (and in some cases, must) invoke judgments, among others, from outside the focal group, to avoid parochial bias" (Sen, 2009: 123). The rationale here is to consider all viewpoints when making decisions, so that all potential sources of bias are removed, including any potential group bias, on the basis that such an approach will produce outcomes that can withstand intensive scrutiny from far and wide. Supporting this notion of open impartiality, Adam Smith advocated that decisions and/or judgments be assessed through the lens of an "impartial spectator"; an agent that has no vested interest in the outcome and that exists independent of both the decision-maker(s) and the recipient (see Smith, 1759; 2009: 131-206; see also Herne and Mård, 2008: 29; Rawls, 1999b: 160-162; Hume, 1738; 1985). In contrast, Sen explained that closed impartiality proposes that: "the procedure of making impartial judgments invokes only the members of a given society or nation (or what John Rawls calls a given 'people') for whom the judgments are being made" (Sen, 2009: 123). Here, because the decision-making process only involves

¹³² Perhaps a better explanatory anecdote is: if you select a football team based solely on the criteria of picking the best players, then you can be said to have acted impartially but at the same time been selective.

those agents with direct interests in the transaction and its outcome, rather than impartial observers, closed impartiality is only able, but also intended, to remove any potential biases held by individual group members, not the group as a whole. Within the literature, there is a degree of agreement that closed impartiality is best achieved by ensuring that stakeholders make decisions from, what Rawls initially called, an “original position” (see 1999b: 15-19 and 102-168; see also Scanlon, 1982; Harsanyi, 1975).

As alluded to above, in the context of the ICC impartiality is important in relation to the decisions/actions of both the OTP and other stakeholders, but particularly the UNSC which will form the focus of much of the following discussion. Now, in a hypothetical, ideal situation open impartiality would perhaps be most desirable for decisions/actions within the ICC system. This is because decisions/actions made and taken by the OTP and UNSC need to be applicable for, and impact on, distant communities and groups that are often separate from the ones that dominate their production (see Sen, 2009: 130).¹³³ In other words, it could be argued that due to the somewhat controversial nature, and the international scope, of the ICC’s work and mandate it would perhaps be of use for the Court’s decisions/actions to stand-up to external scrutiny. In fact it could be argued that one of the reasons behind the discontent from African states towards the ICC is that they feel that their concerns, ideas and interests are often ignored by the primary decision-makers (see Nutt, 2015). As such, in an ideal world, matters relating to the search for international criminal justice would be addressed by an ‘impartial spectator’, perhaps even the ICC itself, who had no vested interests with regards to the situations under consideration.

¹³³ Here, Sen’s discussion on international justice has been applied to an ICC context.

However, the only way that the ICC would be able to fulfil the role of ‘impartial spectator’ would be if the OTP held universal jurisdiction overseen by intensive judicial scrutiny by the Chambers at the ICC. This is not the case for the ICC though, and often the agents responsible for referring situations to the Court are stakeholders who hold vested interests, such as states where the crimes are occurring or the UNSC. Now it should be noted that the OTP is tasked with vetting these referrals but this vetting process concerns the admissibility of the situations before the ICC, measured on the grounds of *rationae materiae* (subject matter jurisdiction), *rationae temporis* (temporal jurisdiction) and *rationae loci* (territorial jurisdiction) (see Schabas, 2011a: 187-190), not the underlying intentions behind the referral; thus, meaning the OTP or the ICC more broadly does not act as an ‘impartial spectator’. Thus, because there is no international ombudsman responsible for vetting the underlying intentions of ICC referrals, as well as the fact that the Court’s jurisdiction does not enable it to assume the ‘impartial spectator’ role itself, the notion of open impartiality cannot be pertained. This means that it is closed impartiality which is most relevant to the work of the ICC in an attempt to remove some or even all of the biases held by decision-making stakeholders in the search for international criminal justice.

Now, although there is agreement over the ‘original position’ concept in general, the basis of how closed impartiality can be achieved is debated (see Rawls, 1999b; Scanlon, 1982; Harsanyi, 1975; 1955; 1953). In Rawls’ depiction of closed impartiality, the conditions of the original position are met when the decision-making stakeholders imagine themselves as existing behind a “veil of ignorance” (Rawls, 1999b: 118-123). According to Rawls, when decision-makers are shrouded by the “veil of ignorance” they do not know their own position within the group or how their decision will impact on themselves or others (Rawls, 1999b: 118-123). For Rawls, this means that because stakeholders are ignorant to how they will be

affected by the outcome of their decision, they will strive to make said decision as impartially and just as possible (Rawls, 1999b: 118-123). It is in this emphasis on ignorance that John Harsanyi and Rawls' depictions of closed impartiality differ, with Harsanyi emphasising a "veil of uncertainty", rather than ignorance, inasmuch as stakeholders will be uncertain as to how they will be affected by a decision and thus make them as impartial as possible (Harsanyi, 1975).¹³⁴

However, there is an inherent issue with applying Rawls and/or Harsanyi's depictions of closed impartiality to international relations, primarily because of the hierarchical structure of international society and the existence of the so-called 'great responsables' as outlined in Section 3.2.1. This is because the very idea of identifying certain states as 'great responsables' with additional rights and duties, supposedly for the good of international society as a whole, requires those states to be aware of their position within said society. Without the knowledge that they are a 'great responsible' a state would be unable to act in a manner that reflects this status. This means that because the 'great responsables' in the UNSC must be aware of their position they will be unable to put themselves behind a 'veil of ignorance or uncertainty' and thus unable to render decisions that meet Rawls and Harsanyi's theoretical demands for impartiality. Now, it could of course be argued that in relation to international crimes, acts which supposedly not only violate universal human rights norms and values (see Clapham, 2015; de Than and Shirt, 2003) but also threaten international peace and security (see Krzan, 2016; Moss, 2012; Clark, 2011; Pickard, 1998), the very nature of being a 'great responsible' means that these states are expected to put aside their own interests and pre-existing

¹³⁴ A more detailed analysis of the difference between John Rawls and John Harsanyi's depiction of closed impartiality is outlined within Harsanyi's article *Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls's Theory* (see 1975).

alliances for the common good of international society, thus, placing themselves behind the hypothetical 'veil of ignorance or uncertainty'. But, the political nature of international society and the need for the 'great responsables' to sometimes use their influence to resolve issues pertaining to international peace and security, means that it is unrealistic to expect them to act as if they do not know their position within international society.

Therefore, if decisions within international relations are to be made in accordance with the demands of closed impartiality then they will perhaps relate more with Thomas Scanlon's depiction (see 1982), rather than those of Rawls or Harsanyi. In Scanlon's theory of closed impartiality, the decision-making stakeholders are fully aware of their position within the society and transaction as well as the factors, material, normative and social, that distinguish them from one another (Scanlon, 1982: 127). Moreover, according to Scanlon, each decision-maker holds equal bargaining powers and a desire to reach a mutually agreeable decision (Scanlon, 1982: 127-128). This means that the decision-making agents need to fully justify their opinions to the extent that they cannot be discredited by the other stakeholders (see 1982: 127-128). In short, for Scanlon, it is the equality of bargaining power, not notions of ignorance or uncertainty, which encourages stakeholders to render impartial decisions that benefit all because if they do not others will reject them and no agreement will be met and all could end up disadvantaged (Scanlon, 1982: 127-128).

However, although Scanlon's theory addresses the problem of 'great responsables' knowing their position within international society, it falls short in other areas insofar as Scanlon's requirement of equal bargaining power does not exist in the UNSC. Each of the P5 holds a veto that they can use to block any resolution regardless as to whether or not the other veto players agree. In its current guise, the veto is rarely a product of mutual agreement

amongst the P5, more often than not being used to buttress self-interest or to protect the interests of political allies, although this is rarely given as a justification for its use. This is because UNSC discussions are underpinned by what Jon Elster termed the “civilising force of hypocrisy”, whereby stakeholders attempt to conceal the determining role of their own interests within their justifications through fear of a reputational backlash (Elster, 1995: 247-248). As such, you will often see the P5 offer explanations pertaining to ground their justifications in accordance with principles of international law or norms and values as a means to protect their own integrity. Nevertheless, returning to the point at hand, it can be argued that the required level of equal bargaining power to consistently bring forth mutually agreeable, and thus impartial, decisions by the P5 does not exist.

In sum, the above discussion perhaps shows that within the UNSC framework it is very difficult to arrive at a situation whereby impartial decisions, as considered to be by Rawls, Harsanyi or Scanlon, can be made. This means that UNSC referrals to the ICC are not able to be delivered with the required levels of impartiality to give them societal acceptance, an issue which will be emphasised in Section 7.4. Moreover, at the general level, impartiality is a challenging notion to fulfil within international society because it is perhaps unrealistic to expect stakeholders not to at least consider how their decisions/actions will impact on their own interests and those of their allies. However, despite these difficulties, it is important to continue to consider impartiality, even if only as an ideal, as a central component of making just decisions/actions within the ICC framework because it exists as a useful tool for strengthening the Court’s credibility and legitimacy. Having discussed the relationship between the notions of justice and impartiality, this thesis now turns its attention to that between justice and law.

3.4.4 Justice as Process: Lawfulness

One means for measuring the extent to which decisions/actions are just on the basis of the process through which they were made, rather than the outcomes they produce, relates to the school of thought that considers justice, in terms of what is right and wrong,¹³⁵ and law to be synonymous, a notion termed “legal justice” by Wojciech Sadurski (see 1984: 332). Aristotle identified the law as a central tool used by society, or societies, to identify just and unjust decisions/actions when he argued that: “the lawless man... [is] thought to be unjust... [and] the law-abiding... man... just. The just, then, is the lawful... [and] the unjust the unlawful” (Aristotle, 350BCE:2009: 82). In short, notions of legal justice, or justice as the lawful, purport that individual decisions/actions are considered to be just when they abide by the law and unjust when they violate the law. At the global level, for this notion of legal justice to remain relevant it is important to acknowledge that, within international society, states should be seen as actors, just like individuals are in domestic societies, not merely as abstract, organising entities (see Wendt, 2004). This means that because states can be said to exert agency within international society the notion of legal justice is applicable insofar as the decisions/actions of states can be classed as lawful or unlawful and subsequently just or unjust.¹³⁶

Similar to the abovementioned benefit of the notion of justice as impartiality, legal justice can be beneficial on the basis that it establishes a framework through which consistent outcomes can be delivered. This is an important observation because it highlights the close relationship, rather than dichotomy, between notions of justice as process and justice as

¹³⁵ See Section 3.1.1.

¹³⁶ To understand this further, Nicholas Wheeler argued that the decision-making role of individuals within international society should be acknowledged by identifying states not as agents *per se* but as structures that enable a state’s representatives to act within international society; although these individuals are supposed act on the behalf of the state as a whole (see 2000: 22-23).

outcomes outlined in the introduction to this Section. However, there is perhaps an underlying issue with notions of legal justice inasmuch as there may be an occasion where the laws themselves may be considered to be unjust, such as the Nuremberg Laws in Nazi Germany, Apartheid legislation in South Africa or the Jim Crow laws in the United States. Explaining the basis of this debate, Sadurski argued that it is important to distinguish legal justice, rightness defined by positive law, from broader notions of “substantive social morality”, rightness born from nature (Sadurski, 1984: 332).¹³⁷ But, even if there is validity to claims that a law is unjust, this does not mean that an individual who has abided by said law has acted unjustly because by acting in a lawful manner they have fulfilled the demands of legal justice. Moreover, as a member of a society it is not acceptable to violate its laws on the basis that you disagree with their content. Instead, societal members must appeal legal decisions on the basis of unjust substantive content and allow an independent, impartial judiciary to rule on the matter, a dispute resolution procedure available before the ICC. As such, until a time when a law is ruled to be unjust by a court of appeal, and thus rescinded from the statute book, the notion of legal justice asserts that just decisions/actions are those that are lawful.

This notion of legal justice is obviously important for our discussion on the ICC because the Court is an international legal organisation established through an international treaty. This means that the ICC’s decisions and requests are legally binding and as such the Court’s members are obliged, by law, to comply with ICC decisions and cooperate when requested to do so, a point emphasised and enshrined in Part Nine of the *Rome Statute* (see ICC, 2011b:

¹³⁷ Wojciech Sadurski’s distinction is perhaps reflective of that between notions of formal and substantive justice, with the former concerning itself with the correct application of rules and the latter with the content of the rules themselves (see Francis, 2015; Rawls, 1999b: 50-52).

55-64). The basis for this argument relates to the sanctity of international conventions and treaties which was given *de jure* recognition in Article 26 of the *Vienna Convention on the Law of Treaties* which states that: “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith” (see UN, 1969: 11). In other words, in accordance with the notion of legal justice, a just decision/action for a state party to the ICC is one that upholds their legal obligation of compliance with the Court’s requests born from being a signatory of the *Rome Statute*. As will be discussed in Chapter Seven, this notion of legal justice is particularly prevalent with regards to the state party compliance in the areas of: the payment of agreed budgetary contributions to the ICC, and the arrest and surrender of suspects indicted by the Court.

In sum, this thesis has argued that one means for measuring whether or not the ICC related decisions/actions of states parties are compatible with justice is the extent to which they comply with the legal requests issued by the Court. Having outlined the concept of legal justice, attention is now turned away from notions of justice through process onto those of justice through virtues.

3.4.5 Justice as Individual Virtue

In addition to being measured in terms of outcomes and/or process, justice of decisions/actions can also be determined in accordance with the virtues displayed by the decision-maker. Here, the focus is placed on the personal nature of the agent responsible for making a decision and justice is determined by the extent to which that individual displays the ideal/desirable character traits, or virtues, for their position. As alluded to in the introduction to this Section, this notion of justice as individual virtue relates closely to the field of virtue ethics (see Ainley, 2017; Elk, 2017; Onuf, 2016; Gaskarth, 2012; 2011;

MacIntyre, 2007; Swanton, 2005; Driver, 2001; 1996; Crisp and Slote, 1997; McDowell, 1997). According to Jamie Gaskarth, virtue ethics, here referred to as justice as individual virtue, “stresses the importance of individual moral cognition” and insists that an organisation’s primary decision-makers “must have certain character traits, such as commitment to moral values, good judgment, integrity and courage, in order to function as moral agents” and thus be able to make just decisions (Gaskarth, 2011: 397).¹³⁸ The importance of virtue ethics is often purported in instrumental terms inasmuch as having elites with good virtues can supposedly improve the overall decision-making process (see Armstrong, 2004; Ned Lebow, 2003) and/or bring about desirable outcomes for all within a society (see MacIntyre, 2007; Driver, 2001; 1996; McDowell, 1997). These insights are of further importance for this discussion on justice because it alludes to the abovementioned argument that notions of justice cannot be solely defined by one catch all theory and that in actual fact matters relating to outcomes, process and virtues should all be considered. Nevertheless, it can be argued that one means for measuring whether or not a decision/action is just is in accordance with whether or not the individual responsible for making said decision holds the desirable virtues to enable them to uphold the moral values of their office.

In the context of the ICC, the usefulness of this notion of justice as individual virtue was alluded to by Gaskarth who described the Court’s creation, and the practice of pursuing individual criminal accountability for international crimes more generally, a “virtue-laden debate” (Gaskarth, 2012: 442). One area Gaskarth (see 2012: 445-448) highlighted where virtues are highly important is within the OTP, not least because the Chief Prosecutor is

¹³⁸ It should be noted that the virtues listed by Jamie Gaskarth relate to his discussion on statespeople and foreign policymakers, rather than the ICC or judicial/legal personnel (see 2011). Although, Gaskarth’s latter work did apply this same virtue ethics framework to the ICC (see 2012).

awarded independent decision-making power by Articles 13(c) and 15 of the *Rome Statute* (see ICC, 2011b: 11). Reviewing Thordis Ingadottir's work (see 2003)¹³⁹ and some of the discussions held prior to the ICC's creation, Gaskarth identifies a number of virtues that ICC officials, such as the Chief Prosecutor, are expected to hold: commitment, courage, courtesy, discretion, fairness, frugality, humility, impartiality, integrity, maturity, modesty, practical wisdom, prudence, sense of justice, sensitivity and sound temperament (see 2012: 445-448). However, as alluded to in Section 2.2.1, although many of the critiques of Luis Moreno-Ocampo's performance as first Chief Prosecutor questioned his individual character, none of these discussions applied a virtue ethics framework in their analysis of Moreno-Ocampo.¹⁴⁰ This lack of discussion is somewhat more surprising given that virtue jurisprudence, analysis which applies a virtue ethics framework to judges and lawyers, is an established field within the philosophy of law (see Blomquist, 2009; Cassidy, 2006; Sherry, 2003; Solum, 2003; 1988; Brown, 2002; Huigens, 2002; 2000; Fisher, 1987/1988; Uviller, 1973). As such, this thesis would argue that the virtues displayed by decision-makers offer a useful tool for measuring whether or not their decisions/actions can be considered just. For this thesis, this method will be primarily used in Section 7.2 in relation to the analysis of the OTP and Chief Prosecutor's practice.

3.4.6 Summary

In sum, this Section has outlined five principles that can be used to measure whether or not decisions/actions can be considered just, which can be grouped within three broader

¹³⁹ Thordis Ingadottir argued that ICC officials should be of "high moral character" (2003: 152). In other words, ICC officials should be virtuous.

¹⁴⁰ Gaskarth used the ICC and Office of the Prosecutor (OTP) as case studies to support his argument regarding the importance of virtue ethics within international society but did not use a virtue ethics framework to critique Luis Moreno-Ocampo's performance (see 2012).

categories: processes, outcomes and virtues. This is important for this thesis because these models form part of the framework through which the compatibility of stakeholder practice with the demands of justice will be analysed in Chapter Seven. The theoretical framework for this thesis includes the demands of all five of the principles discussed within this Section. First, and in relation to the notion of justice as outcome, it was suggested that justice is, by nature, selective because a just decision/action is one where attention and/or resources can be said to have been distributed in accordance with the principle of desert. Second, and again in relation to the notion of justice as outcome, it was argued that just decisions/actions are those where the outcomes produced are consistent, in terms of both context and an identifiable criteria, with one another. Third, and in relation to the notion of justice as process, it was suggested that decision-makers should strive to make decisions/actions as impartially as possible because a just decision/action is one where decision-makers have only been influenced by factors relevant to the transaction. Fourth, and again in relation to the notion of justice as process, the principle of legal justice was outlined which defines just decisions/actions as those which comply with the law. Finally, and in relation to the notion of justice as individual virtue, it was argued that just actions/decisions are required to have been made by a decision-maker that holds, or is at least perceived to hold, certain desirable personal characteristics compatible with the ethical values of the office they hold and/or entity they represent.

Moreover, some broader observations were made within this Section which are important with regards to latter analysis. This Section noted that notions of justice as outcome and justice as process, as well as justice as individual virtue but to a lesser extent, are sometimes said to exist in tension with one another. However, this thesis considers this argument, which posits justice in terms of outcome, process and virtue in opposition to one

another, as disingenuous because none of these three elements can be used as a standalone means through which to measure whether or not a decision/action is just; similar to the situation identified in Section 3.3 regarding procedural justice. Now, this is not to say that some form of analytical hierarchy of these notions of justice does not exist. For example, this thesis would argue that outcomes are perhaps the most important element within a justice transaction because it is these elements that are not only the most visible to stakeholders and external observers an integral component but also the area where most controversy exists.¹⁴¹ Nevertheless, because, as argued above, outcomes alone cannot be used to define a decision/action as being just, notions of justice as outcome, process and virtue must therefore be considered mutually dependent. The basis of this argument is built on a rationale that considers notions of justice as process and virtue in instrumental terms insofar as they are fundamental elements of justice transactions because they buttress the production of outcomes that are credible, legitimate and thus most likely to possess the broadest level of societal acceptance. But, it should be noted that despite this argument and as will be shown throughout Chapters Five, Six and Seven, the outcome/process dichotomy remains a core feature of debates surrounding the ICC's structure and workings.

3.5 Chapter Summary

This Chapter has outlined the relationship between justice and three broad elements: society and institutions (social justice), formal processes (procedural justice), and decisions/actions. This is important because these discussions have identified the components that comprise the normative framework of justice against which the compatibility of the ICC's purposes,

¹⁴¹ For example, it is perceivable that African states are most concerned with the outcomes of the ICC's selection decisions, namely the apparent unfair focus on African situations, rather than the process through which the decisions were made or the virtues held by the decision-maker.

procedures and stakeholder practices will be analysed in Chapters Five, Six and Seven. Now, it should be noted that not all topics will be analysed using all elements of the framework, but all elements of the framework will be used, to varying degrees, within the thesis. In short, within this Chapter, justice was identified as a multi-faceted, subjective concept but it was deduced that it relates, in some way, to notions of right and wrong. Moving on to the normative framework itself, it primarily draws on a Rawlsian conception of justice and consists of three elements, each described briefly below, which exist in no particular hierarchy.

The first element of the framework concerns social justice and suggests that institutions, when embedded with justice, form the basis of fair and functioning societies in two ways: first, by identifying the holders of rights and duties, and assigning them either equally amongst all constituents or unequally but only if such an allocation best serves the interests of all; and second, by acting as a physical and normative coercive force helping to increase compliance with legal commitments and moral duties. The second element of the framework relates to procedural justice and outlines four models that can be used to measure if a procedure is just and thus suitable for purpose: the accuracy model, the process, within reason, produces the desired outcomes; the balancing model, the process represents a fair consideration of the costs and benefits of attaining said accuracy; the participation model, the process allows for stakeholders to participate in proceedings, if they so wish; and the transparency model, the process is clear in relation to how and why an outcome was reached. The final element is threefold and concerns the mutually dependent relationship that exists between the three different ways of measuring whether or not decisions/actions are just. The notion of justice as outcome defines a just decision/action in relation to the outcomes produced, predominantly in accordance with the concepts of desert and consistency. The

notion justice as process defines a just decision/action in relation to the process used to produce outcomes and focuses on principles of impartiality and legal justice. Finally, justice as individual virtue defines a just decision/action in terms of the personal characteristics held and displayed by the decision-maker. Having outlined the normative framework used to evaluate the ICC's purposes, procedures and stakeholder practices, the next Chapter will discuss the methods and methodological approaches used to gather and analyse this thesis' data.

Chapter Four

Methods and Methodology

4.1 Introduction

The aim of this study is to offer an answer to the following research question: to what extent are the purposes, procedures and stakeholder practices surrounding the International Criminal Court (ICC) compatible with theoretical notions of justice?¹⁴² In order to cover these three different aspects of the ICC, a range of approaches, methods and considerations were required. This thesis is primarily a qualitative study, although where relevant quantitative data is used as a means for providing additional evidence, and it adopts an interpretivist perspective in terms of what equates to being compatible with justice. Moreover, the approaches and methods chosen for this study were done so because of their perceived suitability in terms of addressing the research problem and question rather than their popularity, aesthetic appeal or any broader belief that they are the better than the alternatives (see Neuman, 2014: 120 and 195; White, 2009: 89-99).¹⁴³

The remainder of this Chapter will be divided into five parts. The first part will discuss the main approaches used in this thesis and explain their benefits and suitability for the study. The second will concern matters relating to the philosophy of research, including the ontological and epistemological implications of the methodology, with a particular emphasis on critical realism. The third will look at where and how data was collected. The fourth will

¹⁴² The approach to addressing this question was outlined in Section 1.2 and the theoretical discussion on justice can be found in Chapter Three.

¹⁴³ Patrick White argued that sometimes research is driven more by a set of methods rather than what the researcher actually wants to study (2009: 93-97).

concern itself with matters relating to the analysis of data. Finally, the fifth will discuss the issues pertaining to the role of ethics in social research.

4.2 Three Research Approaches

The design of the research was outlined in Section 1.2 but that Section did not cover the approach to analysing data collected. This Section will outline the three approaches used to analyse the data collected by this thesis: a classical approach to International Relations; a mixed methods approach to data collection; and a case study approach.

4.2.1 Classical Approach to International Relations

Approaches to research in International Relations, like that of social science more broadly, tend to fall somewhere in a spectrum between two general lines of inquiry: a scientific/rationalist approach (see Kaplan, 1966) and a classical/normative approach (see Bull, 1966). In the context of the study of International Relations, the suitability of these two lines of inquiry formed the basis of a debate between Hedley Bull (see 1966) and Morton Kaplan (see 1966). In defining these positions, Bull described the classical approach as referring to “theorizing that derives from philosophy, history, and law, and that is characterised above all by explicit reliance upon the exercise of judgment and... that general propositions... must therefore derive from a scientifically imperfect process of perception or intuition” (1966: 361); an interpretivist position (see Neuman, 2014: 103-109). In contrast, Kaplan (see 1966) defended a positivist (see Neuman, 2014: 97-102) approach to analysing International Relations that attempted to replicate some of the demands of proof and verification associated with scientific methods of analysis.

For this thesis, the classical/normative approach was most suited to analysing the ICC. Evaluating the performance of an international organisation like the ICC is not a matter of

science because, as argued by Bull, general claims regarding International Relations are at best “tentative and inconclusive” insofar as they emerge not from replicable and verifiable results but instead from logical arguments grounded in a particular context and theoretical paradigm (Bull, 1966: 361). In the context of the ICC, its claims to do justice or pursue justice are philosophical and ethical considerations, not scientific, and thus, in the words of Bull, pose questions that “cannot by their very nature be given any sort of objective answer” and instead can only be “tentatively answered from some arbitrary standpoint” (Bull, 1966: 366). Now, it is important to note that the study of International Relations has evolved since Bull developed the Classical Approach, not least with the emergence of constructivist (see Checkel, 1998; Hopf, 1998; Wendt, 1995; 1992) and post-structuralist approaches (see Søndergaard, 2002; Østerud, 1997; 1996; Patomäki, 1997; Smith, 1997; Rosenau, 1992), but this thesis would argue that the main premises of the classical approach, that analysing matters in International Relations is best achieved through qualitative/interpretivist studies, remains relevant.

Nonetheless, despite its apparent suitability for this thesis, there are limitations to the classical approach with Richard Shapcott and Robert Jackson and Georg Sörenson suggesting that much of its defining literature (see George, 1976; Bull, 1972; 1966) does not actually provide a framework for data collection or analysis (see Jackson and Sörenson, 2010: 281; Shapcott, 2004: 274). Instead, the classical approach provides an overarching framework for analysis and allows the study of abstract concepts related to philosophy, law and ethics, free from the rigour of verification, proof and replicability associated with the scientific approach. This said, it was necessary to supplement this classical approach to the study of International Relations with a mix of qualitative data, which sought to gauge individual opinions on the ICC’s design and practice, and quantitative data, which aimed to measure the materialistic

elements of the Court's workings and performance; this mixed-methods approach will be outlined further below.

4.2.2 Mixed Method Approach

The primary data collected for this thesis was qualitative and, as will be outlined in Section 4.4, was gathered through interviews, speeches and official reports. However, as Gary King, Robert Keohane and Sidney Verba argued, analysing and attempting to understand an increasingly complex, "rapidly changing social world" is best achieved by using both quantitative and qualitative methods and data (see 1994: 5). This is because different approaches and methods reveal and study separate elements of world politics, all of which combine to give a vision of international reality and support the production of knowledge. Now, this thesis cannot claim to have collected quantitative and statistical data from primary sources, such as surveys, but it did use quantitative data, in the form of statistics, from secondary sources. Such an approach was defended by Gordon Clark who suggested that the use of secondary data from official sources can provide an overview of your topic and serve as "a context for primary data you will subsequently collect" (Clark, 2005: 59). Thus, although this thesis did not use a mixed methods approach for primary data collection it did use a mixed methods approach in terms of the data used to evidence the arguments.

In this study, the main evidence for the arguments is supported and drawn from data gathered from a qualitative approach. Qualitative approaches and data allowed the researcher to gather personal opinions relating to the ICC's structure and practice that may not have been possible using a quantitative approach. These opinions were then recorded and helped in the design of the analytical element of the research as they were used to identify and focus the areas on which would be analysed. This data, whether supportive or

critical of the ICC, was then taken and analysed to ascertain the compatibility of the Court's purposes, procedures and stakeholder practices with the theoretical notions of justice identified in Chapter Three.

With regards to the quantitative element of the study, this thesis uses quantitative data but does not apply a quantitative approach to the analysis or data collection. This means that the quantitative data used within this study is collected from secondary sources and does not have an impact on the design or content of the analysis. Instead, quantitative data is used to evidence, add meaning to and contextualise the arguments drawn from the opinion based qualitative data. This is particularly relevant in Chapter Seven on stakeholder practice where many of the concerns raised by interview respondents and other qualitative data sources are supported with quantitative, statistical data gathered from secondary sources.

In sum, this thesis has employed a mixed-methods approach because it enables a broader understanding and coverage of the topic being researched. However, the manner in which the study was structured requires further explanation. As will be shown below, this thesis applied a variation on the case study approach which has been commonly employed in relation to the study of the ICC.

4.2.3 A Case Study Approach

Case study approaches are common in International Relations and Political Science (see Crasnow, 2012; Eckstein, 2009; Bennett and Elman, 2007), as well as the social sciences more generally (see Neuman, 2014: 42-43; Gomm, Hammersley and Foster, 2009; Yin, 2003), primarily because it allows the researcher to breakdown a large topic into smaller, more focussed and manageable sections to the extent that it aids the broader analytical process (see Yin, 2003: 13). Moreover, Lawrence Neuman defended the use of case studies on the

basis that they serve as a useful tool for connecting the micro-level, defined as the actions of individual actors, to the macro-level, identified as processes or structures (Neuman, 2014: 42). Neuman's observation posits the idea that a case study approach is a useful tool for undertaking Gary Goertz's third stage of concept analysis, which he termed the "indicator/data level", where examples are chosen to ascertain whether or not a real world event or group of events meet the demand of a predetermined concept or concepts (Goertz, 2006: 6). In other words, case studies are selected and used on the basis that they are meaningful, enable the development of a logical argument and add context and empirical evidence to analysis conducted (see Goertz, 2006: 6).

In this study, the case studies are multi-faceted and exist across many levels. At the general level, the thesis focuses on one large case study of the ICC in the sense that this is the broad referent of study. But, studying a large organisation, such as the ICC, in general would be a difficult proposition and as such in order to make the study manageable this thesis breaks down its discussion on the Court into smaller, more focussed elements or case studies. In existing studies on the ICC, it is common for specific geographic case studies of where the Court is active, or in some cases inactive, to be used. However, as alluded to in Section 1.2, the aim of this thesis is to analyse the ICC as a whole by assessing the extent to which its purposes, procedures and stakeholder practices had been compatible with the theoretical framework of justice outlined in Chapter Three. This means that the intention of the thesis is to provide a general discussion on the ICC's design and workings as a whole, rather than any specific commentary on the Court's actions and/or performance within a particular situation under investigation. Moreover, given that an initial observation of the thesis was that the ICC has perhaps performed poorly in general, exploring the extent to which this observation is valid requires data to be collected from all the situations under consideration and/or

investigation by the Court as well as some of those that are not, rather than just a small number. This is because all of the situations being considered by the ICC, as well as some of those where its jurisdiction is not yet active, pose their own individual challenges and obstacles to the Court's functioning and broader legitimacy, and as such it was decided that limiting the situations from where data can be gathered would be detrimental to the thesis' overall analysis. Thus, although the ICC's performance is going to be closely related to how it performs in individual situations, in order to make generalisations regarding the Court's design and workings it was decided that geographic case studies would not be used. Instead, three broad thematic case studies of purpose, procedure and stakeholder practice were chosen to form the focus of Chapters Five, Six and Seven. Furthermore, within these Chapters additional mini-case study discussions on what this thesis considers to be the most important purposes, for Chapter Five, procedures, for Chapter Six, and stakeholders, for Chapter Seven, were also chosen.

In sum, this thesis does use a case study approach but not perhaps in the manner usually found in relation to studies of the ICC or International Relations more generally, where geographic case studies, either state or regional specific, appear to be the norm. Having outlined the three approaches used by this thesis, now attention is turned to the methodology and philosophy of research in the form of the ontological and epistemological assumptions of the study. The focus of the following section will be on critical realism.

4.3 Philosophy of Research: Critical Realism

How we understand and interpret international relations is based primarily on how we conceive knowledge production within social research. Straddling the two extremes of positivism and interpretivism, critical realism is primarily concerned with causality asserting

that although the world is predominantly socially constructed there does exist a real world independent of our knowledge of it (see Moses and Knutsen, 2012: 12; Hall, 2009; Kurki, 2008; 2007; Chernoff, 2007). For critical realists, when we conduct analysis and/or critiques we are basing these on the real world and actual actions rather than just the knowledge that exists (see Moses and Knutsen, 2012: 12; Kurki, 2007: 364; Patomäki and Wight, 2000: 223; Bhaksar and Lawson, 1998: 3). The basis of this position is that knowledge is not meaningful in itself, instead it needs to have a context and relate to something that actually exists or has actually happened (see Patomäki and Wight, 2000: 223). However, rather than being based heavily on a degree of empirical realism adopted by positivists that prioritises regularities and objectivity, critical realism differs insofar as it prioritises the use of conceptual and philosophical explanations to make sense of the world which means that our understandings of the world often reflects pre-existing assumptions that we hold (see Joseph, 2007: 346; Kurki, 2007: 365; Patomäki and Wight, 2000: 223-224). This means that on occasions the knowledge we establish may be wrong and there is no guarantee that the arguments we make are actually depictions of the real world; perhaps they are instead just one interpretation of reality.

Nonetheless, critical realism allows researchers to employ a degree of judgmental rationalism which is congruent with core features of Bull's classical approach, outlined in Section 4.3.1, insofar as it is possible to make a case for certain explanations to be more compelling than others (see Patomäki and Wight, 2000: 224), in contrast to post-structuralist contributions. These reasons for preference may have both historical and social groundings because although our visions of the social world are perhaps constructed through interpretation, social institutions are often anchored in history (see Sayer, 2006). But, critical realism further depicts that realities in international relations are not merely interpretations

of social practice, they have an existence outside of the manner in which agents, be that societal actors or commentators, understand them (Huberman and Miles, 1994: 4).

Furthermore, critical realism provides a useful philosophical framework for this study because it reflects the underlying assumption of this study that both factors of structure and agency could be impacting on the performance of the ICC (see Vadrot, 2017; Wight, 2006; Bieler and Morton, 2001; Wendt, 1987; see also Struett, 2008; Ainley, 2008; 2006).¹⁴⁴ Additionally, critical realism is congruent with the mixed-methods approach outlined in Section 4.3.2 because it views methods as a means for producing knowledge rather than as an end in themselves (Modell, 2009; McEvoy and Richards, 2006). This thesis looks to highlight and enrich the unobservable factors of the ICC's workings and performance through the use of qualitative data and theoretical analysis. However, this thesis expands the rhetorical criticisms and opinions found in the qualitative data by using quantitative data as an additional form of evidence on which to judge the ICC's design and practice with the theoretical framework of justice outlined in Chapter Three. Here, there is an underlying assumption that knowledge uncovered by qualitative methods, which is inherently discursive in nature, needs to be given context by applying it to, or supporting it with, examples from the real, observable world. Having given an overview of critical realism and its importance to the philosophical basis of this thesis, attention is now turned to the methods used to collect data.

¹⁴⁴ Michael Struett (see 2008) and Kirsten Ainley (see 2008; 2006) discuss implications of the structure-agency debate for the International Criminal Court.

4.4 Data Collection

This thesis collected data to support its arguments from a variety of sources. These sources can be divided into three broad groups: interviews, speeches, and official documents. The remainder of this Section will discuss these in turn detailing the rationale for their selection and sources themselves in more detail.

4.4.1 Interviews

This thesis collected data using formal interviews. These interviews were held with individuals from a cross-section of stakeholders relating to the work of the ICC. Formal, individual interviews were chosen because, as highlighted by Bruce Berg, they allow researchers to uncover a “subject’s thoughts, opinions and attitudes about study related issues” (Berg, 2009: 105). Moreover, Berg also suggested that interviews are often chosen as a research method in qualitative studies because of their instrumental benefits, which include: gathering subject specific data informed by specific knowledge and personal experiences (2009: 102-106). For this thesis, these instrumental benefits of interviews were a strong mitigating factor in interviews being chosen as the primary method of data collection because the researcher had no previous experience of working for or in relation with the ICC. As such, interview respondents, who either worked for or in close proximity to the ICC, were considered to be a means for providing invaluable knowledge regarding the Court’s informal workings and practice.

Interview Process

The types of interviews available exist on a spectrum from unstructured to structured (see Davies, 2006: 157; Walliman, 2006: 91-92; Leonard, 2003: 167-168). This thesis conducted semi-structured interviews for three reasons: they are flexible discussions that allow the

researcher to guide proceedings where necessary; they give respondents the freedom to interpret the questions and provide full, comprehensive responses; and they allow for follow-up discussions to occur when needed (see Brinkmann, 2008: 470; Leonard, 2003: 167-168). For this research, using semi-structured interviews meant that the researcher had a pre-constructed list of potential questions (see Appendix A) and, although the interview always started with the same question, not all the questions or topics would be covered in the interview and the questions would not necessarily be asked in the order they appeared on the sheet. In reality, the interviews conducted ranged in length from 30 to 90 minutes, depending on the length of answers given by respondents and their personnel time limitations.

Initially, face-to-face interviews were the preferred method for the researcher because, as research suggests, meeting the respondent in person, and at a time and location convenient for them, is perhaps the most effective means for eliciting the most information (see Walliman, 2006: 92). Furthermore, face-to-face interviews also allow the researcher the opportunity to read/interpret the body language and facial expressions of the respondent (see Walliman, 2006: 92); although this data was not a source of interest for this thesis where the focus was entirely on their verbal responses. However, having conducted the first four interviews face-to-face, making one trip to The Hague and two separate trips to London, it soon became apparent that both financially and logistically face-to-face interviews were not often a viable method to be considered. Thus, financial, logistical and practical constraints, such as the geographically dispersed nature of potential respondents, meant that although not considered as effective as face-to-face interviews the remaining interviews would be conducted via telephone and/or internet video calling as these were cheaper and more

convenient for respondents who were happy to accommodate an interview into their busy schedule.

This meant that telephone interviews developed into the primary method used to conduct interviews for this thesis. As mentioned in the literature, early on the researcher found this style of interview to be more difficult than face-to-face because it was challenging to pick-up cues as to when a respondent is nearing the end of their response and you have to listen very carefully to compensate for the decline in quality experienced over the call (see Walliman, 2006: 92). However, with experience, and given their financial, logistical and practical benefits, telephone interviews proved to be a good substitute for face-to-face interviews, especially for those researchers looking to interview a geographically dispersed and busy group of respondents (see Bloor and Wood, 2006: 61-63; Walliman, 2006: 92-93).¹⁴⁵ This thesis interviewed professional respondents based in Glasgow, London, Paris, Brussels, The Hague, New York, Los Angeles, and Florida, meaning that organising trips to meet with all these individuals in person would have been extremely costly and time-consuming. Moreover, the busy schedules of respondents meant that on more than one occasion interviews were cancelled at the last minute. Had these interviews been planned to be conducted face-to-face this could have resulted in wasted time and money as well as being challenging to rearrange. But, the use of telephone interviews meant that the costs of cancellation and process of rearranging the discussions were kept to a minimum. Finally, when given the choice of whether to be interviewed face-to-face or via telephone many respondents requested a telephone interview or at least cited it as their preferred method.

¹⁴⁵ Nicholas Walliman listed telephone interviews as the most suitable method for interviewing busy people (see 2006: 93).

As such, finances and logistics of being a lone researcher dictated that telephone interviews were perhaps the most cost-effective means for gathering data.

In addition to telephone interviews, the researcher also conducted some video interviews via Skype. Although still limited when compared to discussions on face-to-face and telephone interviews, there is a growing body of literature dedicated to internet video research interviews (see Lo Iacono, Symonds and Brown, 2016; Deakin and Wakefield, 2014; Janghorban, Roudsari and Taghipour, 2014; Sullivan, 2012). It is argued that video calling merges some of the financial, logistical and practical benefits of telephone interviews with some of the benefits of face-to-face interviews, such as the use of visual triggers and rapport building with the respondent (see Lo Iacono, Symonds and Brown, 2016; Deakin and Wakefield, 2014; Janghorban, Roudsari and Taghipour, 2014; Bloor and Wood, 2006). The researcher found that where the respondent had access to Skype and a place where they could conduct the interview in privacy then this method was by far their most preferred. However, finding this necessary private place proved challenging for many respondents who operated in shared offices and as such telephone interviews were more popular. In terms of their use, this researcher found Skype interviews to be just as convenient as telephone interviews but more effective in terms of the interview itself as the visual triggers made the conversation flow better. Moreover, in terms of the conversation and rapport between interviewer and interviewee, Skype interviews delivered similar results to face-to-face interviews.

Finally, the researcher ensured that the entire interview process was formally consented and met with broader ethical considerations, outlined in Section 4.6. All respondents were initially provided with a research information sheet, found in Appendix B,

which detailed the purpose of the research and what the interview process would entail. Moreover, once a respondent accepted the interview request, they were asked to complete an interview consent form, attached in Appendix C, which allowed them to choose if they were happy for the interview to be recorded, the level of anonymity they required (be it person and/or organisation based), and whether they wanted to preview a copy of the written transcript once created (see Brinkmann, 2008: 471; Fontana and Frey, 2005: 715-716). All interview respondents allowed the interview to be recorded which was important because it enabled the researcher to listen in-depth to the responses, rather than having to make detailed notes about what was being said, and allowed the researcher to be fully engaged in the discussion, thus making the interview a two-way process (see Bloor and Wood, 2006: 16-18; Walliman, 2006: 93). Moreover, recording the interviews made their accurate transcription possible. All of the interviews were transcribed by the researcher which was a useful but time-consuming process (see Bloor and Wood, 2006: 166-167; Walliman, 2006: 93). Transcribing the interviews personally allowed the researcher to become very familiar with the content of the interviews, which proved useful in the writing-up stage and during the presentation of ideas at conferences and workshops (see Bloor and Wood, 2006: 167). Once transcribed, a copy was either emailed or mailed to all respondents who had requested a preview. The transcript was accompanied by a disclaimer stating that if no further correspondence is received in four weeks, then it will be taken as meaning that the transcript is accepted for use. In all, only one of the interview respondents replied with any comments regarding the transcript or its content.

Interview Participants

Given the broad topic of this thesis, deciding who to interview was a very challenging process. This thesis deployed a form of, what Ted Palys termed, “purposive sampling” which involves

“a series of strategic choices about with whom, where, and how one does one’s research [and]... implies that researchers sample must be tied to their objectives” (Palys, 2008: 697). This method of sampling means that researchers need to understand “what they want to accomplish and what they want to know” and that this information will then be used to develop an appropriate sample (Palys, 2008: 697). Palys identified nine different forms of purposive sampling and the sample for this thesis was designed in accordance with two - stakeholder sampling and criterion sampling (see 2008: 697).

According to Payls, stakeholder sampling “involves identifying who the major stakeholders are who are involved in designing, giving, receiving, or administering the program or service being evaluated, and who might otherwise be affected by it” (Payls, 2008: 697). This method of sampling was used to identify the groups respondents would come from rather than the specific individuals who would be spoken to. This thesis made a conscious effort to interview individuals from groups who were directly linked to, or impacted by, the ICC’s practice, namely: Non-Governmental Organisations (NGOs); Inter-Governmental Organisations (IGOs); domestic policymakers; legal personnel; and ICC employees. Moving on to criterion sampling, Payls explained that it “involves selecting cases or individuals who meet a certain criterion, for example, that they... have had a particular life experience” (2008: 697). As alluded to above, the criteria used by this thesis to determine suitability for interview included: having worked for or alongside the ICC; working for an organisation that has regular contact, and/or experience of dealing, with the ICC; or experience in working with individuals whose lives are directly impacted on by the work of the Court. Thus for this thesis, criterion sampling enabled the researcher to narrow down the organisations, sections of organisations, and subsequently the individuals where interview requests would be sent.

For instance, NGOs were selected on the basis of their work focus, such as human rights campaigning and monitoring, with specific individuals targeted because of their personal expertise vis-à-vis issues of international criminal law, justice, and/or the ICC. Likewise, IGOs were selected only when their work was directly linked to that of the ICC and again individuals were chosen on the basis that they had a direct involvement with, or personal knowledge about, issues relating to international criminal law, justice, and the relationship of their organisation with the ICC. Domestic policymakers was a challenging group to sample not only because the ICC is comprised of over 120 states but also because even non-member states have opinions on the Court. As such, the researcher had to make a conscious decision about which state, or states, representatives would be interviewed. Given the researcher's location it was decided that United Kingdom (UK) policymakers would be targeted for interviews with the opinions of other states being elicited from speeches and official documents. In relation to the UK government, the individuals highlighted for interview were current and former Foreign and Commonwealth Office (FCO) ministers, and civil servants who had directly engaged with the ICC and matters relating to the Court's work, such as international law. The legal personnel were probably the easiest group to sample because it involved identifying the UK-based barristers who had either previously been employed by the ICC or had worked as a defence council at the Court.¹⁴⁶ Finally, ICC employees formed an integral part of the sample because they were actively involved in the Court's work and were selected from a cross-section of the ICC's organs; although, in the interests of impartiality, representatives from the judiciary were not permitted to be interviewed.

¹⁴⁶ This was done using a combination of the ICC's approved defence council list, personal profiles on Chamber's websites, and through word of mouth.

In total, the researcher sent 108 formal interview requests, in the form of both written letters and emails, to both individuals and/or organisations. These requests were sent out in four waves over the period of one year, starting with wave one in April 2013, which was followed by wave two in August 2013, wave three in October 2013 and the final wave in April 2014. Each request was followed-up with a letter and email sent two weeks after the initial correspondence. Furthermore, some potential interview respondents were sent more than one request across the waves which led to some positive results. As well as individual respondents, requests were sometimes sent to an organisation's public affairs department. Initially, this was done when an identified individual's contact information was not publically available but in the latter waves it was done more often because the researcher found that individuals became more cooperative when a request had been forwarded to them internally rather than a spontaneous request sent directly by the researcher.

The breakdown of interview requests sent in relation to the aforementioned five categories was: NGOs, 29; IGOs, 10; domestic policymakers, 17; lawyers, 31; and ICC employees, 21. From these 108 requests, the researcher conducted 23 interviews between June 2013 and 2014. In the interests of anonymity for those involved, the researcher is unable to disclose the identity of the individuals interviewed, however, those who agreed will be named in relevant quotes within the thesis. The breakdown of the groups from which the respondents came was: NGOs, 10; IGOs, 2; domestic policymakers, 2; ICC employees, 4; and lawyers, 5. Thus, it can be seen that NGOs were the most accommodating and willing to cooperate. IGOs were less accommodating with some, particularly UN agencies, declining the requests in the interests of neutrality. Ministers and civil servants were, for the most part, unwilling to comment on matters other than official government policy, so often merely repeated information that could be found in speeches and policy documents. Barristers were

very cooperative and knowledgeable about the topic but many of the high profile QCs, whom appear to be the only individuals permitted to practice before the ICC, were very busy and often unable to be interviewed. Finally, active ICC employees were very accommodating and the Court's office of public affairs were helpful in identifying respondents and arranging interviews but they did limit the requests to two individuals and were quite intrusive with regards to the research content. I was also reprimanded by the office of public affairs for attempting to contact individuals directly.

4.4.2 Speeches

Speeches were chosen as a data source to supplement interviews because they provide a useful source of evidence and information regarding the general opinions and visions of stakeholders towards the ICC and international criminal justice. The speeches chosen were done so due to the topics they were covering, the individual delivering them, and in some cases the department, organisation or state they were representing.¹⁴⁷ Speeches were also useful for gauging the opinions of high-profile individuals within the ICC, such as Chief Prosecutors, Registrars and Presidents, who, because of their time commitments and workloads, were unable to grant a personal interview. Moreover, some individuals, such as ICC judges, and organisations, like the United Nations (UN) and its constituent bodies or the International Committee of the Red Cross (ICRC), declared a line of neutrality towards the ICC itself as an organisation, its work and even the situations where it is or could be active. This left speeches they deliver as the only means for gauging their opinions towards the topics being discussed within this thesis. Where possible the transcript of the speech as it was delivered was used as the data source, rather than pre-submission documents, although on

¹⁴⁷ For instance, sometimes a representative from the United Nations (UN) Secretary General's office will deliver a speech on their behalf if they are unavailable.

the occasions where the former was not available the latter was consulted alongside the video and/or audio recording of the speech as it was delivered. In short, just like interviews, speeches were primarily used as a source of evidence and a means for gauging the opinions of relevant ICC stakeholders, particularly those who were inaccessible for personal interviews.

4.4.3 Official Documents

An official document refers to any document issued by a state, international/regional organisation, NGO or media outlet that includes information about policies or context regarding a situation under investigation by the ICC. These included: official policy reports from the Office of the Prosecutor, such as those on case selection ICC, complementarity and preliminary examinations; Decisions and/or Judgments issued by the ICC's judges, pertaining to individual cases and/or situations;¹⁴⁸ reports presented, and Resolutions adopted, at the Assembly of States Parties' (ASP's) annual conference, which include discussions on complementarity, cooperation and the budget; NGO reports on crimes committed in situations under examination by the ICC and sometimes those not; UN reports, most notably those produced by official commission of inquiries, which again often detail information regarding potential violations of international criminal law; United Nations Security Council (UNSC) meeting transcripts from discussions not only on the situations of Darfur and Libya, referred to the ICC by the Security Council, but also those discussing the role of justice and international law in the context of peace and security as well as the role of the ICC in international relations; and finally the content of journalistic articles, both online and print, was used to support arguments being made. In general, these documents were chosen because they provided important information and/or opinions regarding the ICC's design, workings or

¹⁴⁸ There are too many of these to cite relevant examples.

practice. For the most part, they provided both quantitative and qualitative data that was used to complement the broader points raised in interviews and speeches.

4.5 Positionality and Reflexivity

Qualitative research studies are not without problems, not least because interpretations from the data gathered presupposes a degree of subjectivity in the knowledge produced. Reva Joshee argued that all qualitative “research is political inasmuch as it comes out of a particular view of the world” (Joshee, 2008: 640) which means that the researcher’s own background, pre-existing knowledge, and life experiences all impact on both the research and knowledge production process. In order to address this, Joshee argued that researchers should “declare their relationship to a topic of research and uncover some of their biases before embarking on a study” (2008: 641), a process called reflexivity (see Bourke, 2014; Sarhana, 2007; Bloor and Wood, 2006: 145-147; Jupp, 2006: 258-259; Brewer, 2003: 259-262). Moreover, the broader acknowledgement of the researcher’s role in the research process, as well as their opinions towards the subjects being studied, is called positionality (see Bourke, 2014; Chereni, 2014; Hammond and Wellington, 2013; Sarhana, 2007; Ganga and Scott, 2006). The remainder of this section will cover three areas: the cultural background and ethnicity of the researcher; the challenge of insider research regarding interview participants; and the issue of researcher/participant power relations.

4.5.1 Cultural Background and Ethnicity of the Researcher

The cultural background and ethnicity of the researcher was an important factor to consider when embarking on a study of the ICC. The ICC has long faced criticisms of being a Europeanised court, pursuing an agenda built on Western liberal norms and values (see Hoile, 2014a). This means that as a European studying the ICC it is likely, as was the case in this

research, that the researcher's initial position was one that was sympathetic and supportive of the Court and its broader goals. For instance, having lived their whole life in a liberal democracy governed by a rule of law which, for the most part, is applied equally to everyone had a large bearing on how the researcher interpreted the concept of justice was defined and how the ICC and an international rule of law should operate and be applied.

Perhaps more challenging for the study was the fact that the researcher was a white, European male which made it difficult to discuss and sometimes understand some of the controversial issues connected to the ICC's practice, such as allegations of bias and racial stereotyping. On the one hand, it was relatively simple for the researcher to provide logical arguments rebutting claims that the ICC has been unfairly selective, biased or even racist. However, these opinions may have been shaped by the fact that: first, the researcher has never been subjected to racial discrimination at either the personal or societal level, so may perhaps be less familiar with the context and appearance of these types of concerns; and second, as a white European, not a black African, the researcher existed outside of the group most affected by, and concerned with, the ICC's actions. As such, it is important to note that the researcher's opinions towards these issues was influenced and shaped by the fact that they were a cultural outsider to the concern. Furthermore, due to the sensitivity and controversial nature of some of the topics being discussed, particularly the issue of selectivity and alleged bias, it was vital to ensure that all claims made by the thesis were accompanied by a strong theoretical grounding. Furthermore, where possible this thesis attempted to draw on opinions from those directly involved in, and affected by, the ICC's work to understand the roots of the concerns. Of particular use here was drawing on data and information sources from a cross-section of stakeholders and ethnicities so as to broaden the opinions covered. Having discussed the influence of the researcher's own cultural and ethnic background over

the study, attention is now turned to the challenges resulting from researcher/participant power relations.

4.5.2 Researcher/Participant Power Relations

Sometimes within qualitative studies the researcher may be considered to hold a privileged position over participants (see Råheim *et al*, 2016; Karnieli-Miller, Strier and Pessach, 2009; Riley, Schouten and Cahill, 2003). However, for this thesis the power relation questions were somewhat different because all of the participants were professionals with vast levels of technical knowledge and personal experiences surrounding the topic, sometimes more than the researcher themselves. This knowledge, experience and expertise on the topic means that, based on Zoe Slote Morris' definition (see 2009: 209), the participants for this study can be considered elites. This is important because when interview respondents are elites sometimes the power relations can become complicated and the unequal researcher/participant relationship can become an unequal participant/researcher one.

The academic literature on interviewing raises some potential issues with interviewing elite professionals (see Mikecz, 2012; Harvey, 2010; Rice, 2010a; Morris, 2009), some of which were experienced during this study. For instance, some commentators suggested that, even with the promise of anonymity, elite respondents may be wary of sharing privileged information (see Mikecz, 2012: 484; Harvey, 2010; Rice, 2010a: 72; Morris, 2009: 213-214). Moreover, it was noted that some elites may also attempt to steer or even dominate interview proceedings (see Mikecz, 2012: 484; Rice, 2010a: 73; Morris, 2009: 213-214). This thesis did not encounter dominating elites but the researcher did find that some participants tended to steer conversations away from controversial issues and towards their own areas of expertise. In fact, many respondents attempted to avoid discussions on the practice of the

ICC and its stakeholders, preferring to focus much more on purposive and procedural factors. As a young, inexperienced interviewer, this was something that the researcher found challenging during the data collection process and, particularly from early interviews, perhaps explains some gaps in the interview data. Having discussed the issues of positionality and reflexivity, this thesis now turns its attention to the ethical considerations to be undertaken during research.

4.6 Ethical Considerations

In research, the term ethics refers to the set of standards that underpin the conduct of research. According to Nicholas Walliman, ethics are important because they give research findings legitimacy on the basis that they show that the research was conducted in the proper manner with the proper levels of approval and consent (see 2006: 147). As such, in order to ensure that the study was conducted in an ethical manner, the researcher consulted a number of ethical codes and checklists, including: Plymouth University's *Research Ethics Policy* (see 2015); the Economic and Social Research Council's (ESRC's) *Framework for Research Ethics* (see 2015); the Social Research Association's (SRA's) *Ethical Guidelines* (see 2003); and the UK Research Integrity Office's (UKRIO's) *Code of Practice for Research* (see 2009) and *Recommended Checklist for Researchers* (see 2017); familiarised themselves with discussions on research ethics from the academic literature (see Neuman, 2014: 145-162; Bloor and Wood, 2006: 64-69; Walliman, 2006: 147-162; Hopf, 2004: 334-339); and gained prior ethical approval from Plymouth University's Business School's Ethics Committee (see Appendix D). From these commentaries and discussions, the researcher divided ethical considerations into two broad topics, each of which will be discussed in more detail below: protection of peoples and data handling/protection.

4.6.1 Protection of Peoples

One of the central purposes of research ethics is to ensure that both the participants and researcher feel safe and are protected from potential harm throughout the process; including after the interview has taken place (see Neuman, 2014: 147-151; Bloor and Wood, 2006: 68; Walliman, 2006: 155-156; Mcauley, 2003: 97-98). In order to ensure the protection of participants, the researcher ensured that all potential respondents were fully informed of the details of the research and consented to being interviewed.¹⁴⁹ All interview requests included a research information sheet (see Appendix A) which detailed the purpose and scope of the research, in a non-technical language accessible to all, as well as gave details regarding the proposed interview process. Furthermore, prior to any interviews taking place, respondents were asked to complete and sign an interview consent form (see Appendix B), and again the scope of the research was explained and the respondents were given the opportunity to ask questions about the study, interview and/or use of data.

Finally, throughout the process all respondents were made aware that their participation in the research was optional and that they could withdraw their contributions at any time before, during or after the interview.¹⁵⁰ With regards to withdrawal after the interview, all participants were given a business card with the researcher's contact details and a letter with the contact details of Plymouth University's Ethical Committee and the researcher's Director of Studies, so any concerns could be addressed. Moreover, all respondents were forwarded, on their own request, a copy of the interview transcript and given the opportunity to withdraw or qualify part or the entirety of their interview. This

¹⁴⁹ This ensured that the research fulfilled the informed consent consideration which is a core element of research ethics (see Neuman, 2014: 151-152; Wiles *et al*, 2007; Walliman, 2006: 154-155; Christians, 2005: 144; Hopf, 2004: 335-337; Mcauley, 2003: 96-97).

¹⁵⁰ This fulfils the right to withdraw element of research ethics (see Wiles *et al*, 2007; Hopf, 2004: 335).

transcript was emailed to the participant, unless requested to be mailed, and an accompanying letter outlined that if no response was received within four weeks then the transcript would be considered accepted (this was also explained to participants at the time of interview). Of those who requested copies of the transcript, no respondents chose to withdraw their interview and only one respondent returned the transcript with annotations.

4.6.2 Data Handling and Protection

Due to the sensitive nature of the topics being discussed during the interviews, the researcher made all possible efforts to protect the confidentiality of the respondents and their responses (see Neuman, 2014: 154-156; Christians, 2005: 145; Mcauley, 2003: 97). Obviously, for matters of safety, as mentioned above, some individuals were subject to knowledge of the whereabouts of the interviews but not the content of the discussion or the identity of the individual being interviewed. Each transcript and recording was coded numerically, for example 'Interview 1', 'Interview 2', which corresponded to a participant list that was kept on a secure server, in a password protected file that only the researcher had access to. Moreover, no analysis of interview transcripts was conducted on paper copies, only digital ones, so as to avoid leaving an unnecessary paper trail. Finally, respondents were informed that all data will be kept for a period of ten years before being destroyed.

Moving on to the use of data, whether or not respondents were to be named personally, by organisation/profession, or be kept completely anonymous was the choice of the participant through the interview consent form (see Appendix B). Majority of the respondents asked for personal anonymity but were happy for organisational or professional identifications to be used. However, although personal anonymity is used within the thesis, as identified by Cristel Hopf, there is a possibility that overt clues to the respondent's identity

can be found in the written data presented in research (Hopf, 2004: 338). In order to minimise this, any noticeable language or statements that could reveal the respondents identity were automatically removed from the transcripts, unless it was considered an important contribution and then additional consent was gained from the respondent for its use. This was particularly important for lawyers and representatives from the ICC who often directly referenced specific cases which meant that their identity could be easily uncovered. However, when this was noticed none of the respondents had any issue with the data being used.

4.7 Chapter Summary

This Chapter has outlined the broad methods and methodologies used for this research. Combining a classical approach to the study of International Relations with a mixed-methods approach for data collection enabled an exploration of the compatibility of three aspects of the ICC's design and workings, purpose, procedure and practice, to be analysed in accordance with theoretical demands of justice. This Chapter also considered the choices, or lack thereof, of case studies, how data was collected – emphasising the role of interviews, and the critical realist research philosophy of the thesis. Finally, the Chapter concluded with a discussion on the issues of positionality and reflexivity as well as some of the ethical considerations taken during the study.

Chapter Five

A Purposive Analysis of the International Criminal Court

5.1 Introduction

The aim of this Chapter is two-fold: to outline some of the purposes accredited to the International Criminal Court (ICC); and to analyse the compatibility of these purposes with aspects of the normative framework of justice outlined in Chapter Three. There is no shortage of literature dedicated either entirely, or in part, to discussing the purposes¹⁵¹ of the ICC and/or international criminal law more generally (see Ainley, 2011a: 310-311; Cryer *et al*, 2010: 22-39; Klamberg, 2010; Damaška, 2009; 2008; Damgaard, 2008: 15-27; Keller, 2008a: 266-278; Drumbl, 2007: 59-66; Drumbl, 2005: 577-595; Findlay and Mclean, 2007; Koskeniemi, 2002a: 2-11).¹⁵² However, almost all of these discussions, with the exception of the contributions of Mirjan Damaška (see 2009; 2008) and Mark Klamberg (see 2010), focus on purposes linked to the practice of punishing international crimes, such as deterrence, retribution and/or reconciliation (see Cryer *et al*, 2010: 22-39; see also Cohen, 1981). Thus, these discussions emphasise the purposive impact of punishing international crimes rather than broader goals of international organisations, such as norm development and diffusion (see Park, 2006; Finnemore, 1993), individual organisational aims of the ICC, such as ending impunity for international crimes (see UN, 2012g; 1999; ICC, 2013c; Robertson, 2005), or

¹⁵¹ Within the literature the terms aim, goal, intention, objective, and purpose are used interchangeably. In the interest of variety, this thesis will also use these terms interchangeably but in the broader context of the same theme.

¹⁵² Additionally, there are a number of discussions which focus on an individual purposive element such as: deterrence (see Bosco, 2011; Kim and Sikkink, 2010; Ku and Nzelibe, 2006; Akhavan, 2001; Klabbers, 2001); peace and security (see Clark, 2011); punishment (see Lang, 2008); reconciliation (see Méndez, 2001); truth finding (see Mendeloff, 2004); and recording history (see Wilson, 2011), many of which will be cited later in the Chapter.

specific objectives of both domestic or international criminal trials, such as judging guilt or truth-finding (see Brennan, 1990; 1963).

However, this thesis considers this narrow approach to defining the ICC's purpose, which focuses almost solely on matters relating to the practice of punishment, as problematic because it ignores some the objectives related to international organisations, the Court in general, and of criminal trials. This is perhaps a problem because, as inferred by both Damaška (see 2009) and Klamberg (see 2010), the specific aims of criminal trials and the broader goals of punishment are in fact intrinsically linked and perhaps even mutually dependent.¹⁵³ This means that it could be argued the extent to which the ICC can deliver the broader purposes related to punishment, such as deterrence and reconciliation, will be determined by the Court's ability to act effectively as primarily a criminal justice institution but also as an international organisation. In other words, the punishment purposes accredited to the ICC are in fact by-products reliant on the Court being able to achieve other more important aims. Moreover, the practice of identifying the ICC's purposes as synonymous with those of punishment poses another issue for the Court inasmuch as it perhaps creates high and/or unrealistic expectations regarding what it can actually achieve by: inflating the number of objectives associated with the Court and by linking goals to the ICC that it realistically has very little, if any, control over. This has two further implications for the ICC: first, such a high number of expectations risks overburdening the Court (see Damaška, 2009: 331); and second, when the Court fails to meet these unrealistically high objectives, its credibility and legitimacy is greatly undermined (see Burke-White, 2008: 58-62; Cameron, 2008: 58-59; Schiff, 2008: 133).

¹⁵³ This same argument can be applied to the organisation aims of the International Criminal Court (ICC).

In light of these observations, this Chapter will not consider purposes pertaining to the punishment of international crimes by the ICC and instead focus aims relating to three separate levels of the ICC, the societal level, the organisation level and the practical level, and analyse their compatibility with the some of the theoretical demands of justice outlined in Chapter Three. This will be done by dividing the Chapter into three sections. The first Section focuses on the societal level and considers the ICC's purpose to act as a court of last resort and the extent to which it can achieve this by acting as a norm diffuser. The second Section concentrates on the organisational level and discusses the ICC's purpose of ending impunity. The final Section addresses the practical level and details the purpose of holding trials before the ICC.

5.2 Societal Level Objective: A Court of Last Resort

A familiar phrase used to describe the ICC is: 'a court of last resort' (see IBA, 2017a; ICC, 2017e; Batambuze, 2015; Dicker, 2012; Mendes, 2010; Amnesty, 2008b: 2; Kirsch, 2007: 543 and 545). However, as highlighted by a representative from the Office of the United Nations High Commissioner for Human Rights (OHCHR) interviewed for this thesis, this is more than simply a descriptive phrase; it is in actual fact the ICC's purpose.¹⁵⁴ The idea of the ICC's purpose as a 'court of last resort' is intrinsically linked to the principle of complementarity¹⁵⁵ which depicts that the Court will only become active if, in the words of the *Rome Statute*, a state is genuinely "unable" or "unwilling" to investigate and prosecute international crimes committed on its territory or by its nationals in its own criminal justice system (see ICC, 2011b: 13-14). Thus, the fact that a purpose of the ICC is to act as a 'court of last resort' actually

¹⁵⁴ Interview with representative from the Office of the United Nations High Commissioner for Human Rights (OHCHR), 26 June 2014.

¹⁵⁵ More detail on the principle of complementarity will be outlined in Section 6.3.

serves to highlight that the primary duty to investigate and prosecute international crimes rests with states; both within their own domestic systems and/or through the notion of universal jurisdiction. In fact, Song Sang-Hyun, the ICC's former President, argued that: "international criminal justice will ultimately only be successful if the national justice systems of each state function effectively, thereby enabling the ICC to serve its intended role, which is to be a court of last resort, complementing national jurisdictions" (see 2010: 1). This means that a potential purpose of the ICC is to encourage, or even coerce, states into complying with this aforementioned duty (see Arbour, 2003: 585).¹⁵⁶

Interestingly, this suggestion corresponds with Section 3.2.2's discussion on how institutions can increase compliance with legal commitments and moral duties by facilitating the coercive power of justice. In Section 3.2.2, it was suggested that the ICC may be able to improve state compliance with their duty to investigate and prosecute international crimes domestically through a form of physical coercion, achieved by increasing the physical and social costs, such as a diminishing of reputation and sovereignty, which stem from instances of non-compliance and/or being subjected to an intervention by the Court. However, it is more likely that the ICC could buttress state compliance with this duty through the notion of normative coercion, also discussed in Section 3.2.2, achieved by supporting the diffusion of an anti-impunity or pro-individual accountability norm, that prioritises the prosecution of those responsible for international crimes (see Engle, Miller and Davis, 2016; Engle, 2015; Kim and Sharman, 2014; Ohlin, 2009; Pensky, 2008; Dugard, 1999), within international society to the extent that it becomes internalised within states way of thinking (see Chayes and Chayes,

¹⁵⁶ Louise Arbour, former Chief Prosecutor at the International Criminal Tribunal for the former Yugoslavia (ICTY), argued that the existence of the ICC as a 'court of last resort' means that its "greatest success... may consist of encouraging full and fair domestic prosecutions" (see 2003: 585).

1995).¹⁵⁷ To this end, this thesis will argue that a broad, societal objective of the ICC is to act as a diffuser of the aforementioned anti-impunity/pro-individual accountability norm within international society.¹⁵⁸

From the outset, the ICC's creation has been championed as reflecting a normative shift towards an anti-impunity/pro-individual accountability norm by a cross-section of actors within international society. For example, former United Nations (UN) Secretary General Ban Ki-Moon, speaking at the celebration marking the tenth anniversary of the signing of the *Rome Statute*, stated that the ICC's creation signified the belief that: "impunity for crimes can never be tolerated; amnesties for international crimes are unacceptable" (2008: 1). Likewise, in an interview for this thesis, a representative from Human Rights Watch (HRW) suggested that the ICC's creation "has really raised expectations for justice around the world" so that even the idea of "promoting an amnesty gets, kind of, hopefully further and further back in our collective history, at least for these types of crimes".¹⁵⁹ Finally, in a statement made prior to a United Nations Security Council (UNSC) meeting on the role of the ICC in October 2012, Amnesty International argued that the ICC's creation was indicative of international society's discontent with impunity for international crimes: "the very existence of the Court signified the determination of the international community to end impunity for crimes under international law" (Amnesty, 2012: 1).

¹⁵⁷ The benefits of diffusing an anti-impunity/pro-individual accountability norm relate to those purported of criminal prosecutions, including the individualisation of guilt and responsibility and recognising the inherent dignity of victims (see Pensky, 2008; Dugard, 2002; Méndez, 1997; Bassiouni, 1996b; Edelenbos, 1994; Orentlicher, 1991), as well as the benefits pertaining to the punishment referred to in Section 5.1 and 1.3.1.

¹⁵⁸ The idea of international courts and/or organisations, through both their existence and practice, supporting norm diffusion has substantial support within the academic literature (see Bower, 2013; Sikkink and Kim, 2013; Lamont, 2011; Sikkink, 2011; Park, 2006; Dekker and Werner, 2004; Finnemore, 1993).

¹⁵⁹ Interview with representative from Human Rights Watch (HRW), 17 February 2014.

However, despite these positive indications that the ICC's creation, a somewhat logical progression from the establishment of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), signifies a preference for individual criminal accountability over impunity, debates remain as to whether criminal proceedings are in fact the best response to international crimes, with the benefits of alternatives, such as amnesties (see Robinson, 2003; Majzub, 2002; Naqvi, 2003; Scharf, 1999) and truth commissions (see Bakiner, 2013; Ainley, 2011b; Moler, 2010; Gibson, 2009; Pascoe, 2007; Williams, 2002b), being considered. Luis Moreno-Ocampo, the first ICC Chief Prosecutor, acknowledged this debate in his 2003 inauguration speech: "there are so many divergent interests in the world today that there is not even a consensus about the basic goal of punishing genocide" (see 2003a: 2). Moreover, this apparent tension between accountability and amnesty has been a divisive and obstructive feature of United Nations Security Council (UNSC) discussions pertaining to the current Syrian Conflict;¹⁶⁰ with France, the United Kingdom (UK) and the United States (US) demanding accountability, whereas, China and Russia have continually questioned its suitability to helping resolve the situation.¹⁶¹ Nonetheless, this thesis holds that those responsible for international crimes should be prosecuted for two primary reasons: first, victims deserve redress for injustices they have suffered; and second, in order for the rule of law to function effectively there needs to be negative consequences for those individuals who violate it. Therefore, the inconsistency of international society's commitment to individual criminal accountability, evidenced by the debates over how to respond to alleged

¹⁶⁰ Similarly, the Lomé Peace Accord, signed in an attempt to bring an end to the Sierra Leonean Civil War on 7 July 1999, included the provision of a blanket amnesty for all senior officials involved in the hostilities (see Tejan-Cole, 1999).

¹⁶¹ At no time was this distinction perhaps clearer than on 22 May 2014 when China and Russia vetoed a draft Resolution, sponsored by France, the United Kingdom (UK) and the United States (US), that would have referred the Syrian situation to the International Criminal Court (ICC) (see UN, 2014a).

international crimes committed in the Syrian conflict, suggests that the desirable anti-impunity/pro-individual accountability norm has yet to be fully diffused. Thus, such an argument perhaps buttresses this thesis' observation that a role of the ICC is to aid in the diffusion and internalisation of an anti-impunity/pro-individual accountability norm.

Evidence of this norm diffusion purpose for the ICC does exist, with commentators on International Law and Relations, civil society groups and ICC officials suggesting that helping to alter how states respond to violations of international criminal law will be the Court's primary sign of success and thus perhaps its most important objective. For example, in a reflective report published in the aftermath of the Rome Conference, Amnesty International commented that:

the true significance of the adoption of the [Rome] Statute may well lie, not in the actual institution itself in its early years... but in the revolution in legal and moral attitudes towards the worst crimes in the world. No longer will these crimes be simply political events to be addressed by diplomacy at the international level, but crimes which all states have a duty to punish themselves (as quoted in Pace and Thieroff, 1999: 396).

Likewise, in his remarks to Bilgi University, Istanbul, on 22 May 2013, Song Sang-Hyun, argued that:

the real power of the ICC is not in the Court alone, but in an entire system of international justice incorporating international organisations, states, and civil society organisations. With every year that goes by, the normative consensus around the world grows strong that impunity in the case of the most heinous crimes cannot be

tolerated and that justice must be done when mass atrocities have been committed (2013a: 5).

Finally, international legal scholar, Bruce Broomhall, argued that it was unlikely that the required overthrowing of the power dominated and inherently competitive international environment, that often obstructed the enforcement of international criminal law, would occur and thus:

the best remaining hope for the entrenchment of international criminal law as a regular feature of the international system is the development of a deeply rooted culture of accountability that leads to a convergence of perceived interests and of behaviour on the part of the States responsible for enforcing this law. The ICC and related developments may in fact contribute to the emergence of such a culture, although the present signals are not uniformly positive (2003: 3).

Thus, it can be argued that an objective of the ICC is to help facilitate the adoption of an anti-impunity/pro-individual accountability norm within international society, so that criminal prosecution, not amnesty, emerges as the universally accepted response to those individuals accused of committing international crimes.

In fact, this role for the ICC in buttressing the development of a normative consensus on the preference for prosecuting violations of international criminal and/or humanitarian law was highlighted as an area of substantial success for the Court in an interview with a representative from the ICC's Registry. According to the Registry's representative:

perhaps a... bigger element of success, that I think we have actually achieved, is the notion of international justice permeating the higher level discussions at the UN...

Even those states that oppose, or oppose the actions of, the ICC, nowadays have integrated into their speech the notion that international justice is necessary... You know... now you don't see any Security Council Resolution, dealing with a conflict situation, that doesn't mention... at the very least... international justice mechanisms or justice as an integral component.¹⁶²

Moreover, statistics gathered from UNSC Resolutions appear to support this claim insofar as there has been a noticeable increase in the number of Resolutions referencing elements connected to the goals of the ICC and, more broadly, international criminal justice, such as ending impunity for international crimes and pursuing accountability and/or justice for those deemed responsible for violating international criminal and humanitarian law. For instance, as can be seen in Table 5.1, in the period prior to the ICC's creation (1946-1997) there were only 39 references to the aforementioned elements in UNSC Resolutions. This is in stark contrast to the 425 mentions that have occurred in the period since the ICC's creation (1998-present).

Now, this large increase in references to international criminal justice related elements since the ICC's creation appears to suggest some correlation between the two and perhaps even suggests that the Court has helped in the diffusion of an anti-impunity/pro-individual accountability norm within international society. However, using the statistics outlined in Table 5.1 as evidence of whether or not the ICC has acted as a norm diffuser is difficult not least because it is plausible that the Court was in fact established as a result of a normative shift towards a preference for individual accountability rather than being responsible for bringing about this shift. Furthermore, as will be outlined in Chapter Seven,

¹⁶² Interview with ICC Registry representative, 20 June 2013.

Table 5.1 - Table Showing Number of Security Council Resolutions Mentioning Ending Impunity, Punishing Crimes, and/or Pursuing Justice or Accountability¹⁶³

Period	Number of Resolutions
1946-1997 (Pre-ICC Era)	39
1998-Present (Post-ICC Era)	425

(Sourced: UN, 2017a)

the actions of certain ICC stakeholders, in this case the states party to the *Rome Statute* and the UNSC, perhaps suggests that an anti-impunity/pro-individual accountability norm is not yet diffused to the extent that it has become internalised by states and thus altered their actions and policies. Nevertheless, the aim of this Section is not to assess the extent to which the ICC has successfully, or unsuccessfully, acted as a norm diffuser but instead to analyse the compatibility of this purpose of the Court in accordance with sine if the theoretical demands of justice outlined in Chapter Three.

As alluded to at the beginning of this Section, the idea that a purpose of the ICC is to act as a norm diffuser appears to be congruent with the normative coercive power of justice outlined in Section 3.2.2. This normative coercion differs from physical coercion, which alters behaviour through the threat of negative consequences or even formal punishment, because the pressures to comply are societal and born from a state considering itself to be a member of a club and thus bound by certain standards of behaviour pertaining to said club. In other words, the normative coercive power of justice does not rely on threats to breed compliance, it instead increases compliance by altering the way states perceive certain actions and policies. Robert Cryer both identified the ICC as a norm diffuser and alluded to the normative

¹⁶³ Data correct as of August 2017.

coercive effect that justice can have on states, following the institutionalisation of desirable standards of behaviour, when he argued that it is hoped that:

through the existence of the ICC as an embodiment of the ideal of international criminal law, and state interactions with it, states would internalize the ideals, and simply prosecute international crimes on the basis that they ought to be prosecuted per se, without regard to the concern that the ICC might otherwise do it (2005b: 995-996).

In sum, this thesis would argue that the ICC's purpose to act as a diffuser of an anti-impunity/pro-individual accountability norm, which would encourage states to investigate and prosecute alleged violations of international criminal and humanitarian law domestically, is compatible with the theoretical demands of justice because, as noted in Section 3.2.2, the institutionalisation of a desirable standard of behaviour vis-à-vis the response to international crimes is a pre-requisite for the normative coercive power of justice to take effect and alter the actions of states. This is an important observation because it affirms this thesis' argument that, for the most part, it is stakeholder practice, not the ICC's purposes or procedures, which have been incompatible with the theoretical demands of justice. Having outlined the ICC's purpose as a norm diffuser and argued that it is compatible with some of the theoretical demands of justice outlined in this thesis' framework, this thesis will now turn its attention to the broad organisational aim of the Court: to end impunity for international crimes. This is an interesting progression because, if the diffusion of an anti-impunity/pro-individual accountability norm is considered to be synonymous with broader efforts to establish a culture of accountability within international society, then these two purposes are linked

because, as former UN Secretary General Kofi Annan argued, “[establishing] a culture of accountability is the best antidote to impunity” (see 2006).

5.3 Organisational Level Objective: Ending Impunity for International Crimes

Perhaps the most oft-quoted purpose of the ICC is: to end impunity for international crimes. References to the ICC’s role in ending impunity was a common feature of the interviews conducted for this thesis. For example, when asked about the ICC’s purpose an international legal practitioner interviewed for this thesis responded simply with: “to close the impunity gap”.¹⁶⁴ Likewise, Tiina Intelmann, the former President of the Assembly of States Parties (ASP), was equally clear of the ICC’s central goal: “the purpose of the International Criminal Court is to end impunity... [The] Statute is also very revolutionary in terms of how it treats victims... But, the general aim is to end impunity”.¹⁶⁵ Moreover, the ICC’s goal of ending impunity has been given much coverage in the academic literature (see Rothe and Collins, 2013; Gibb, 2010; Mayerfeld, 2006; Beigbeder, 2005; Robertson, 2005; Benzing, 2003; Hall, 2004; Politi and Nesi, 2001), as well as by international policymakers and senior Court officials. For instance, both Kofi Annan, UN Secretary General 1997 to 2006, and Ban Ki-Moon, UN Secretary General 2007 to 2016, alluded to the ICC’s objective of ending impunity, with Annan arguing that the Court was created “to put an end to the global culture of impunity” (see 1998c: 24) and Ki-Moon listing “ending impunity” as one of its core “aims and ideals” (see 2008). Similarly, many of the ICC’s senior officials have highlighted the importance of the goal of “ending” or “fighting” impunity, with it being described as the: “overall goal” by Philippe Kirsch (see 2004: 7) (ICC President 2003-2009); the “ultimate goal” by Luis Moreno-Ocampo (see 2003b: 4) (Chief Prosecutor 2003-2012), and Song Sang-Hyun (as cited in ICC, 2012) (ICC

¹⁶⁴ Interview with an international legal practitioner, 12 September 2013.

¹⁶⁵ Interview with Tiina Intelmann, former President of the Assembly of States Parties (ASP), 16 September 2013.

President 2009-2015); its “mission” by Bruno Cathala (see 2003: 2) (ICC Registrar 2003-2008) and Silvana Arbia (see 2011: 4) (ICC Registrar 2008-2013); its “mandate... vision... and underlying goal” by Herman von Hebel (see 2013: 2-4) (incumbent Registrar); its “object and purpose” by Fatou Bensouda (see 2014) (incumbent Chief Prosecutor); and its “quest” by Silvia Fernandez de Gurmendi (see 2015: 6) (incumbent ICC President). Therefore, the attention given to identifying the ICC’s purpose as ending impunity perhaps places it as the Court’s primary objective.

However, identifying the ICC’s purpose as simply to end impunity is at best vague because it poses the question of: impunity for who or what is to be ended? A similar question was also posed, albeit rhetorically, in a meeting of the foreign ministers of the ICC states parties by Moreno-Ocampo, when he asked: “must the Prosecutor initiate an investigation in all situations that appear to fall within the jurisdiction of the Court” (see 2005: 8). In other words, should impunity for every crime and individual be ended? The answers to these questions is possibly no, an answer underpinned by the gravity thresholds that supposedly guide not only where, but also whose, impunity should be ended (see Smeulers, Weerdesteijn and Hola, 2015; deGuzman, 2013; 2012b; 2009; Stegmiller, 2011; Heller, 2010; SáCouto and Cleary, 2008).¹⁶⁶ In fact, alluding to the importance of gravity thresholds in guiding the work of the ICC, both Annan (see 1997) and Ki-Moon (see 2008) argued that the Court was created because of the historical tradition that had allowed those alleged to have been most responsible for the most serious crimes under international law to go unpunished. Thus, it could be argued that the ICC’s purpose is much narrower than to simply end impunity insofar

¹⁶⁶ The procedural importance of notions of gravity will be discussed in Section 6.4.

as it is guided by two purposive gravity criteria (see ICC, 2003: 6-7): an act-based criterion and a person-based criterion.

The act-based gravity criterion shapes the ICC's end impunity purpose at two levels. On the one hand, the act-based threshold depicts that the ICC's jurisdiction be limited to, in the words of the *Preamble* of the *Rome Statute*, "the most serious crimes of concern to the international community as a whole" (see ICC, 2011b: 1 and 3). These so-called "crimes of concern", genocide, crimes against humanity, war crimes and the crime of aggression (see ICC, 2011b: 3), are sometimes referred to as the "core crimes" (see Armstrong, Farrell and Lambert, 2012: 197; Cryer *et al*, 2010: 3-21; Schabas, 2009: 273; Bassiouni, 2008b; Damgaard, 2008: 57-86; Bantekas and Nash, 2003: 164; Boister, 2003: 961-963); offences which are universally recognised, defined and prosecutable under international law regardless of state actions or interpretations (see Boister, 2003: 961-963). In other words, the ICC's purpose is to end impunity for a limited number of crimes which have been chosen because of their purported severity and that they supposedly violate some of the fundamental norms and values upon which international society is constructed. On the other hand, the act-based gravity criterion defines the situations where the ICC should become operational. This distinction between gravity of crime and gravity of offence was outlined by Moreno-Ocampo, again during the meeting the foreign ministers of ICC members: "gravity in our statute is not only a characteristic of the crime, but also an admissibility factor, which seems to reflect the wish of our founders that the ICC should focus on the gravest situations in the world" (see 2005: 8-9). Here, it would appear that Moreno-Ocampo is purporting the idea that the ICC's purpose is thus to end impunity in the situations where the most severe violations of international criminal law have occurred. This act-based gravity threshold is enshrined within the Article 17(1)(d) of the *Rome Statute* which states that a situation will be considered

inadmissible before the ICC if: “it is not of sufficient gravity” (see ICC, 2011b: 13).¹⁶⁷ In short, it can be argued that the act-based gravity criterion narrows the ICC’s purpose to ending impunity for the most serious violations of a specific set of offences that are said to offend the conscience of the entire world.

The rationale behind this act-based gravity criterion was outlined as being twofold by Moreno-Ocampo: “tak[ing] on multiple situations, including those of comparatively lesser gravity, would... [increase] demands for cooperation and... might lead to ICC ‘fatigue’ and a diminishing of support... [And] a Court accepting all situations would also need a much larger budget” (see 2005: 8). So, for Moreno-Ocampo, the rationale for narrowing the ICC’s ending impunity purpose, in accordance with an act-based gravity threshold, was instrumental inasmuch as it is linked to the potential procedural limitations that might emerge from adopting a broader understanding of the objective.¹⁶⁸ Put simply, the restrictions placed on the ICC by an act-based gravity criterion are designed as a means for best utilising the limited resources, both financial and physical, available to the Court (see Heller, 2010: 229; deGuzman, 2009: 1414; SáCouto and Cleary, 2008: 819; Robinson, 2003: 485).¹⁶⁹

In contrast, in terms of purpose, the person-based gravity criterion helps address the question of whose impunity should be ended. According to the 2003 *Paper on Some Policy Issues before the Office of the Prosecutor*: “as a general rule, the Office of the Prosecutor should focus its investigation and prosecutorial efforts and resources on those who bear the

¹⁶⁷ See also: 2003 *Paper on Some Policy Issues before the Office of the Prosecutor* (ICC, 2003: 6-7); 2006 *Draft Criteria for Selection of Situations and Cases* (ICC, 2006c: 4-6); 2006 *Report on Prosecutorial Strategy* (ICC, 2006d: 5-6); *Prosecutorial Strategy 2009-2012* (ICC, 2010a: 5-6); 2013 *Policy Paper on Preliminary Examinations* (ICC, 2013d: 15-16); and 2016 *Policy Paper on Case Selection and Prioritisation* (see ICC, 2016d: 12-14).

¹⁶⁸ The importance of cooperation and the balancing role of gravity thresholds will be outlined in Sections 6.5 and 6.4 respectively.

¹⁶⁹ Issues pertaining to the provision of resources for the ICC will be discussed in Section 7.3.1.

greatest responsibility, such as leaders of the State or organisation responsible for these crimes” (see ICC, 2003: 7 emphasis removed).¹⁷⁰ This purposive concept was further enshrined into the Office of the Prosecutor’s (OTP’s) way of thinking by Moreno-Ocampo when he outlined that his Office would pursue a “policy of targeted prosecution” against those “who bear the greatest responsibility” (see 2004: 2). The importance of Moreno-Ocampo’s “policy of targeted prosecution” was reiterated in the 2010 *Prosecutorial Strategy 2009-2012* which stated that: “the Office will select for prosecution those situated in the highest echelons of responsibility, including those who ordered, financed, or otherwise organized the alleged crimes” (see ICC, 2010a: 6). Finally, and perhaps further stressing the importance of a person-based gravity criterion, Jo Stigen argued that it has long been a guiding light in the search for international criminal justice: “international criminal jurisdictions have, from the Nuremberg and Tokyo Tribunals – via the *ad hoc* Tribunals – to the ICC, focussed on the most responsible persons” (2008: 369).

However, there is a caveat to the assumed dominance of a person-based gravity criterion, founded in accordance with the notion of prosecutorial discretion (see Davis, 2015; Schabas, 2008a; Greenwalt, 2007; Lovat, 2006; Jallow, 2005; Brubacher, 2004; Danner, 2003), whereby the Chief Prosecutor can focus their investigations and prosecutions against individuals bearing less responsibility if they believe that doing so would serve the broader interests of justice (see SáCouto and Cleary, 2008: 843-850).¹⁷¹ Moreover, it has been posited

¹⁷⁰ See also: 2006 *Draft Criteria for Selection of Situations and Cases* (see ICC, 2006c: 13); 2006 *Report on Prosecutorial Strategy* (see ICC, 2006e: 5); 2010 *Prosecutorial Strategy 2009-2012* (see ICC, 2010a: 5-6); 2013 *Policy Paper on Preliminary Examinations* (see ICC, 2013d: 15-16); 2013 *Strategic Plan June 2012-2015* (see ICC, 2013a: 13); 2015 *Strategic Plan 2016-2018* (see ICC, 2015a: 16); and 2016 *Policy Paper on Case Selection and Prioritisation* (see ICC, 2016d: 12-14).

¹⁷¹ According to the OTP’s 2013 *Strategic Plan: June 2012-2015*: “the Office will also consider prosecuting lower level perpetrators where their conduct has been particularly grave and has acquired extensive notoriety” (see ICC, 2013e: 14). This paragraph was directly repeated in the 2015 *Strategic Plan 2016-2018* (see ICC, 2015a: 16).

that the ICC could perhaps exert more a deterrent impact if no limitations were placed on who could appear before the Court (see Cryer, 2009; see also Schabas, 2011a: 200-203). Such an argument was actually expressed by the ICC's Appeals Chamber, in a written response to Pre-Trial Chamber I's claim that the deterrent impact of the Court would be best served by targeting high-ranking officials (see ICC, 2006f: 28), when they stated that: "it seems more logical to assume that the deterrent effect of the Court is highest if no category of perpetrators is *per se* excluded from potentially being brought before the Court... The imposition of rigid standards primarily based on top seniority may result in neither retribution nor prevention being achieved" (see ICC, 2006g: 20).

Nevertheless, despite these caveats, it can still be argued that, in general, a person-based gravity criterion narrows the ICC's purpose to ending impunity for those individuals alleged to have been most responsible for committing international crimes. There are three primary rationales given for adopting this person-based gravity threshold. First, as with the aforementioned act-based gravity criterion, resource limitations have been listed as a potential rationale for focussing the ICC's attention onto those most responsible for committing the crimes, simply because the Court cannot afford to pursue individuals beyond those most responsible (see Jurdi, 2011: 84; Robinson, 2003: 494). Second, and as suggested by Neil Kritz, although modern developments in international law have depicted a customary obligation to prosecute international crimes, it "does not, however, demand the prosecution of every individual implicated in the atrocities. A symbolic or representative number of prosecutions of those most culpable may satisfy international obligations" (1996: 134; see also Robinson, 2003; Morris, 1996; Orentlicher, 1991). Finally, Daryl Robinson argued that there is great moral worth behind a policy that targets those most responsible because: "there is a significant difference between the situation of the low-level perpetrator and those

who orchestrate the crimes... [and] those individuals who were manipulated by propaganda and swept up in a tide of evil” and that such a policy was essential to “honour the victims, to uphold basic values, and to send a message of deterrence to other potential ringleaders” (Robinson, 2003: 494-495).

In short, from this Section’s discussion on the act and person-based gravity criteria, it can be argued that one of the ICC’s main organisational objectives is: to end impunity for those individuals alleged to be most responsible for committing the most serious violations of international criminal law. For our discussion on notions of justice, the existence of these gravity criteria, and their defining role in the ICC’s purpose, is important because they serve to highlight the inherently selective nature of the international criminal justice regime (see Cryer, 2005a; Brown, 2003). This inherent selectivity is important to note because it reflects the argument outlined in Section 3.4.1 that justice is, by nature, a selective concept that involves choosing between competing claims of desert and resources. From this discussion, it could be argued that the gravity criteria help resolve the competing claims for the ICC’s attention and resources by defining notions of desert as relating to the gravest violations of international criminal law, and then the selection of those individuals alleged to have been most responsible for said violations. In other words, the desert criteria at the heart of the ICC’s end impunity purpose are severity and responsibility. Moreover, this inherent selectivity in the ICC’s purpose means, as argued by Cryer, that “the question is therefore not whether selective prosecution should occur... but when selective enforcement is unacceptable” (2005a: 192); a question which will be given further thought in Sections 7.2 and 7.4.

In sum, this thesis would argue that the ICC’s purpose to end impunity for those most responsible for the most serious violations of international criminal law is compatible with

the theoretical demands of justice because the existence of the act and person-based gravity thresholds is not only congruent with Section 3.4.1's argument that justice is a naturally selective concept but also provide a criteria to help the Court resolve potential disputes over competing claims to its attention and resources. This is an important discussion because it affirms this thesis' argument that, for the most part, it is stakeholder practice, not the ICC's purposes or procedures, which have been incompatible with the theoretical demands of justice. Having outlined the ICC's purpose of ending impunity for those most responsible for the most serious violations of international criminal law, this thesis will now turn its attention to the practical level objective of the Court: holding trials. This is an interesting progression because the aim of ending impunity and the purpose of holding trials appear to be related, as shown in this statement from the representative from OHCHR interviewed for this thesis: "the purpose of the ICC, as I see it, is to constitute to ending impunity or the gravest international crimes... by conducting trials".¹⁷²

5.4 Practical Level Objective: Trials before the International Criminal Court

The ICC is a criminal court and thus one of its primary functions has to be holding trials. However, as mentioned in Section 5.1, there exists much less discussion on the purpose of holding trials for international crimes than the perceived instrumental benefits associated with punishing them. Aside from Damaška (see 2009) and Klamberg's (see 2010) abovementioned discussions, which focus on the purposive elements of international criminal procedures, the only other discussion this author could find considering the objective of holding trials for international crimes was by Elinor Fry (see 2014: 258-260). Through an analysis of Hannah Arendt's *Eichmann in Jerusalem: A Report on the Banality of Evil* (see

¹⁷² Interview with representative from the Office of the United Nations High Commissioner for Human Rights (OHCHR), 26 June 2014.

2006), Fry deduced that there are three schools of thought surrounding the purpose of trials for international crimes: liberal legalist, didactic legality or history, and the by-product doctrine. Of these, only the first two, liberal legalist and didactic legality or history, will be considered by this Section because they are of most relevant to the discussion.

According to Fry, the liberal legalist school hold there to be only one purpose of criminal trials, be that domestic or international, which is to determine “the guilt or innocence of the accused” (2014: 258; see also Wilson, 2011: 1-5; Drumbl, 2007: 5; Arendt, 2006: 5 and 258; Bass, 2000: 7-8). Perhaps the primary advocate of this position was Arendt who argued that: “the purpose of a trial is to render justice, and nothing else” because any other aims will only stand to “detract from the law’s main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment” (Arendt, 2006: 253).¹⁷³ Contrastingly, Fry noted that the legal didactic or history school consider history telling and writing to be the primary objective of international trials (see 2014: 258; see also Jain, 2014; Wilson, 2011: 16; Douglas, 2001; Osiel, 1997). Outlining the history writing purpose of international trials, Mark Osiel argued that trials for mass atrocity crimes, particularly those held at the international level, aim to: “influence the collective memory of the catastrophic events they publicly recount and officially evaluate. Revising public understandings of the country’s recent past by dispelling impressions propagated by authoritarian predecessors often becomes a central objective” (2009: 147).¹⁷⁴

¹⁷³ Hannah Arendt also suggested that: “justice demands that the accused be prosecuted, defended, and judged, and that all the other questions of seemingly greater import... be left in abeyance” (2006: 5).

¹⁷⁴ In his opening speech to the International Military Tribunal Nuremberg (IMTN), the British Chief Prosecutor, Sir Hartley Shawcross, suggested that the Nuremberg Trials would serve to be as much of a lesson in history as in law: “this Tribunal... will provide a contemporary touchstone and an authoritative and impartial record to which future historians may turn for truth, and future politicians for warning” (see IMTN, 1947d: 92).

Interestingly, this debate between the liberal legalist school and the legal didactic or history school appears to reflect the discussion held in Section 3.4 pertaining to the tension that exists between notions of justice as outcome and justice as process. The liberal legalist school appears to reflect and emphasise notions of justice as outcome insofar as their purpose of an international trial is defined with a focus on adjudicating guilt or innocence, in other words the outcomes of the trial process. Whereas, the legal didactic or history school appears to reflect and emphasise notions of justice as process because they define the purpose of an international trials in terms of producing a history of atrocities, in other words prioritising a focus on the process in general. As such, the remainder of this Section will be dedicated to outlining which of these two schools of thought, if any, take precedence, before analysing this reality in accordance with the outcome/process element of the theoretical framework discussed in Section 3.4.6.

Now, the aims emphasised by both the liberal legalist school and the legal didactic or history school are discussed in relation to the objectives of the ICC. However, from both the interviews conducted for this thesis and some of the ICC's official documents, it would appear that there is a consensus behind the liberal legalist school and thus defining the purpose of ICC trials with an emphasis on their outcomes, namely delivering prosecutions and/or verdicts, rather than on the process of history writing. For example, in an interview with Fadi El Abdallah, the ICC's Spokesperson, he argued that: "the purpose of the International Criminal Court is clear in its Statute. It is basically to prosecute and try persons that are suspected of being the most responsible of war crimes, crimes against humanity, and genocide".¹⁷⁵ Similarly, a representative from the American Non-Governmental Coalition for

¹⁷⁵ Interview with Fadi El Abdallah, ICC Spokesperson, 20 August 2013.

the International Criminal Court (AMICC) claimed that: “the purpose of the International Criminal Court is to prosecute and try atrocity perpetrators who cannot be tried in any other way”.¹⁷⁶ Finally, perhaps the clearest defence of the liberal legalist school’s position, and subsequently discrediting of the legal didactic or history school’s position, was outlined by the OTP in their 2006 *Draft Criteria for Selection of Situations and Cases*, which stated that:

the goal of the OTP is not to establish a complete historical record; this is not a role for which an international criminal court is well suited. Rather, the OTP will bring a relatively limited number of cases that are representative of the overall scope of the crime, against those bearing the greatest responsibility for the most serious crimes (see ICC, 2006c: 10).

Thus, it can be argued that there is a clear emphasis on the liberal legalist school’s position of emphasising the purpose of ICC trials in terms of delivering verdicts, or their outcomes, rather than in terms of the legal didactic or history school’s position of producing a history of the atrocities committed, or the general process.

Moreover, an international criminal law specialising, British-based barrister interviewed for this thesis not only echoed the argument that the purpose of trials at the ICC are in line with the liberal legalist school but also offered a rationale behind this position by contrasting the realities of the ICC project with that of previous international tribunals, specifically the ICTY and International Military Tribunal Nuremberg (IMTN). According to the barrister, the ICTY and IMTN were able to serve a history writing purpose, alongside that of prosecution, because they were addressing “closed chapters of history... so you knew

¹⁷⁶ Interview with representative from American Non-Governmental Organization Coalition for the International Criminal Court (AMICC), 16 September 2013.

everything that had happened... and it wasn't going to expand", whereas, the ICC could not because it is "there to deal with cases that are going to happen today, tomorrow, next week... so it can't do that because it doesn't have the time or the resources".¹⁷⁷ As such, the barrister suggested that ICC trials should prioritise delivering verdicts by compiling small, focussed cases because the accused has:

only got one life, we can only lock him away for at maximum life, that's all we can do. So if we've got, you know, three or four cases iron clad against him, and we can get him convicted and locked away for life, do that. And as regards the rest of it, leave that to the historians... and then move onto the next one.¹⁷⁸

In addition to the rationale that the context of the situations where the ICC becomes active does not lend itself to the history writing purpose, it has been argued that focussing on prosecutions and delivering verdicts serves a broader instrumental role. For instance, in an interview with another British-based barrister with experience in international criminal law it was argued that the ICC needs to focus on conducting trials and delivering verdicts as a means for encouraging its states parties to continue funding it:

at present it [the ICC] is being forced to justify its existence. At a time of economic and financial strictures a lot of countries who pay for the ICC are effectively saying: why should we?... The question then is absent of indictees, absent of on-going trials, are countries like Japan going to be prepared to pay for this White Elephant in The Hague? I doubt it.¹⁷⁹

¹⁷⁷ Interview with British-based barrister 2, 25 November 2013.

¹⁷⁸ Interview with British-based barrister 2, 25 November 2013.

¹⁷⁹ Interview with British-based barrister 1, 25 June 2013.

Alternatively, the aforementioned British barrister reiterated a preference for the ICC focussing on conducting prosecutions and delivering verdicts on the grounds that by increasing the number of trials completed will advance the Court's deterrence capabilities because: "future criminals are going to say: 'hey. It's not a question that they're never going to get round to me. They are extremely dedicated to one thing, which is imposing sanctions on people like me".¹⁸⁰ Finally, aiding deterrence, with the addition of supporting reconciliation efforts, was cited as a reason why the ICC should prioritise conducting prosecutions and delivering verdicts by a representative from HRW interviewed for this thesis:

I think the purpose [of the ICC] is pretty straightforward and that's to hold to account the perpetrators of the world's worst crimes... I think there are a lot of secondary values that people the attach to that, you know if it achieves that purpose could it then also help to, for example, deter future crimes... could it contribute to reconciliation. I think those are all... possible positive effects... But from my point of view the primary purpose is to hold criminal trials. To hold fair processes that are seeking to assign responsibility... for mass atrocity.¹⁸¹

In short, the arguments outlined above appear to purport the idea that the purpose of ICC trials is attached to notions of justice as outcome, particularly conducting prosecutions and delivering verdicts, rather than notions of justice as process, in terms of writing history. However, it is important to draw attention to the last statement offered by the representative from HRW which emphasised the importance of the ICC's trials being fair processes. Here, the

¹⁸⁰ Interview with British-based barrister 2, 25 November 2013.

¹⁸¹ Interview with representative from Human Rights Watch (HRW), 17 February 2014.

focus on process does not relate to the broader history writing purpose discussed above but instead to the necessity of international trials, such as those conducted before the ICC, abiding by internationally recognised principles of due process, just like their domestic counterparts (see Birnbaum, 2015; Gordon, 2007; Cogan, 2002; DeFrancia, 2001; AJIL, 1946).¹⁸² This is important for this thesis because it appears to reflect the argument made in Section 3.4.6 that although outcomes are perhaps a priority in justice transactions, fair processes are also a pre-requisite because it is through these that said outcomes gain credibility, legitimacy and societal acceptance. In other words, although it can be argued that the primary purpose of holding trials before the ICC should be outcome focussed, conducting prosecutions and delivering verdicts, it is vital that these trials are perceived to be fair because if this is absent then any outcomes produced will most likely lack credibility, legitimacy and societal acceptance. Such an argument, albeit in relation to trials before international criminal courts in general, was expressed by Jacob Cogan: “if trials are unfair, or perceived to be unfair, international criminal courts... might quickly lose their legitimacy” (Cogan, 2002: 114).

In sum, from the above discussions this thesis would argue that, when qualified by this latter observation, identifying the purpose of ICC trials in terms of their outcomes, namely conducting prosecutions and delivering verdicts, is compatible with the theoretical demands of justice because it can be argued to be congruent with the mutually dependent relationship between notions of justice as outcome and process outlined in Section 3.4.6. This is an important observation because it affirms this thesis’ argument that, for the most part, it is

¹⁸² The *Rome Statute* makes two references, Article 17(2) and 20(3)(b), to the importance of the ICC acting in accordance with “the principles of due process recognised by international law” (see ICC, 2011b: 13 and 16).

stakeholder practice, not the ICC's purpose or procedures, which have been incompatible with the theoretical demands of justice.

5.5 Chapter Summary

To summarise, this Chapter outlined what this thesis has identified as the primary purposes of the ICC pertaining to three different levels of analysis, the societal level, the organisational level and the practical level, and analysed the extent to which they can be considered compatible with elements of the normative framework of justice outlined in Chapter Three.

At the societal level, it was argued that a core purpose of the ICC is to act as a diffuser of an anti-impunity/pro-individual accountability norm in the hope that such a norm would become internalised by states to the extent that they would begin to feel obliged to investigate and prosecute alleged violations of international criminal and humanitarian law domestically. This norm diffusion aim was considered to be compatible with the normative coercive power of justice discussed in Section 3.2.2 where it is suggested that, when desirable standards of behaviour become institutionalised, societal pressures of compliance emerge and can help alter the actions or policies of states.

At the organisational level, it was argued that the oft-quoted, general aim of the ICC, to end impunity for international crimes, should actually be considered as being much narrower and defined by two interrelated gravity criteria, identified within this Chapter as an act-and person-based threshold. From this discussion, it was deduced that one of the ICC's purposes is to end impunity for those most responsible for the most serious violation of international criminal law. This narrower end impunity goal was considered to be compatible with Section 3.4.1's argument that justice is by nature a selective concept. Moreover, it was noted that the act-and person-based gravity criteria were of further importance because they

could help the ICC resolve potential disputes over competing claims for its attention and resources, a core role of theoretical conceptions of justice detailed in Section 3.4.1.

Finally, at the practical level, it was argued that the purpose of ICC trials are predominantly identified in terms of outcomes, namely conducting prosecutions and delivering verdicts, rather than the process of history writing. However, it was noted that although the primary purpose of ICC trials should be defined in terms of outcomes, ensuring that investigations and prosecutions were fair processes was of vital importance because only then will any outcomes produced possess credibility, legitimacy and societal acceptance. This was considered to be compatible with the argument pertaining to the mutually dependent relationship between notions of justice as outcome and justice as process held in Section 3.4.6.

In short, the compatibility of what this thesis considers to be three of the primary ICC purposes with elements of this thesis' theoretical framework of justice, outlined in Chapter Three, is important because it affirms the main argument of this thesis that, for the most part, it is stakeholder practice, not the ICC's purposes or procedures, which have been incompatible with the theoretical demands of justice. Having discussed some of the main purposes of the ICC, and their compatibility with this thesis' normative framework of justice, the next Chapter will focus on some of the main procedures that underpin the Court's operations.

Chapter Six

Core Procedures of the International Criminal Court

6.1 Introduction

Having previously considered the purposive elements of the International Criminal Court (ICC), this Chapter will focus on some of the Court's most important procedures. There are many procedures that assist the functioning of the ICC, which cover areas relating, but not limited to, the selection of situations, outreach and victim programmes, and the Court's trial framework. However, for issues of time and space, this thesis has decided to focus on four, which have been chosen because this thesis considers them to be the most controversial in relation to the ICC's functioning. The first is the referral process, which was chosen because it is the trigger for situations appearing before the Office of the Prosecutor (OTP) for examination. The second and third processes are those relating to notions of complementarity and gravity, which were chosen because they are essential components of how the OTP selects the situations that form the focus of its investigations and prosecutions. The final process is cooperation which, unlike the previous three, does not relate to matters of selection but is chosen because, as alluded to in Section 2.3.2, adequate cooperation is fundamental to the ICC's ability to operate effectively, not least because the Court does not have its own police force.

However, as a caveat, it is important to recall the discussion and observation from Section 3.3.1, which identified the ICC system as an example of what John Rawls termed 'imperfect procedural justice'. This means that although the Chapter will raise some limitations within these four procedures, it is important to distinguish between these limitations in design from an incompatibility with the demands of procedural justice,

identified in Section 3.3. As such, the aim of this Chapter is to analyse the extent to which the abovementioned four ICC processes are compatible with elements of the theoretical framework of justice outlined in Chapter Three, not to pass judgment on their overall efficacy. In order to do this, the Chapter will be divided into four sections, each dedicated to one of the processes: the first will concern the referral process; the second the process of complementarity; the third the gravity measuring process; and the fourth the cooperation process.

6.2 Referrals

The discussions surrounding referrals, the means through which the ICC's jurisdiction would be triggered, were some of the most controversial and sensitive held during the Rome Conference, with the main focus being on who could, and should, be able to refer situations to the Court (see Williams and Schabas, 2008: 563; Lee, 1999: 21). The role of three main protagonists, the United Nations Security Council (UNSC), the states parties and the Chief Prosecutor, dominated proceedings. Initially, the blueprint for the *Rome Statute*, the International Law Commission's draft statute (see UN, 1994), did not include provisions for Chief Prosecutor referrals, included only limited state party referral capabilities in relation to the crime of genocide, and placed a heavy emphasis on the UNSC; something that certain states, such as India (see Ramanathan, 2005), wanted to avoid (see Williams and Schabas, 2008: 563-564). However, eventually, after much debate, discussion and compromise, three means for triggering the ICC's jurisdiction were agreed outlined in Article 13 of the *Rome Statute* as: state party referral, UNSC referral, or Chief Prosecutor referral (see ICC, 2011b: 11; see also Schabas, 2011a: 157-186). Now, it should be noted that a referral does not automatically trigger a Full Investigation, instead it only opens a Preliminary Examination of

the situation in question where further evidence is gathered.¹⁸³ Nevertheless, these referrals remain a central process for the operation of the ICC and the remainder of this Section will analyse them individually.

6.2.1 State Referral/Self-Referral

Article 14 of the *Rome Statute* deals with the state referral mechanism and states that: “a State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed” (see ICC, 2011b: 11). Now, as mentioned in Section 2.3.4, there has been some controversy surrounding this form of referral insofar as it has primarily been used in the form of so-called ‘self-referrals’ whereby a state refers a situation on its own territory where international crimes have potentially been committed. In fact, of these two referral types, only those stemming from a situation state itself have made it to Full Investigation and these situation, the Democratic Republic of Congo (DRC), Uganda, Central African Republic I (CAR I), Mali and CAR II, account for half of those currently at the Full investigation state at the ICC. Moreover, at the time of writing, the only state that has referred a situation not on their own territory to the ICC is Comoros, who, in May 2013, referred an incident involving an Israeli raid on a Gaza Flotilla to the Court for consideration; a situation that remains under Preliminary Examination (see ICC, 2017f). As such, because they are the most common form of ICC referral, self-referrals will form the focus of this Sub-Section.

Now, as noted in Section 2.3.4, self-referrals have been the subject of much academic debate, with some commentators arguing that they were not envisaged by the ICC’s designers

¹⁸³ A possible issue with the practice of the Office of the Prosecutor (OTP) pertaining to Preliminary Examinations is discussed in Section 7.3.2.

(see Schabas, 2010c; 2008a; Arsanjani and Reisman, 2005), some that they violate the principle of complementarity (see Hassanein, 2017; Schabas, 2008b; Kress, 2004), and some that they pose issues for the ICC in relation to impartiality by buttressing the possibility of politicisation (see Akhavan, 2010; Müller and Stegmiller, 2010; Gaeta, 2004). Nevertheless, Darryl Robinson put forward a compelling case, that this thesis agrees with, for why self-referrals were envisaged by the ICC's designers and thus remain a valid referral method (see Robinson, 2011: 357-377). This is not to say that self-referrals are not without concern because, as stated by a British-based barrister interviewed for this thesis, there is the possibility that leaders are using self-referrals to "get rid of the political opposition" or "get rid of a problem which they cannot solve themselves".¹⁸⁴ However, concerns such as these relate to the way self-referrals have been used in practice rather than the process itself, and it is matters of process, not practice, that is of concern for this thesis.

In terms of compatibility with the theoretical demands of procedural justice, it can be argued that the self-referral process described above relates to the three primary models of procedural justice outlined in Section 3.3, accuracy, balancing and participation. On the one hand, the self-referral process perhaps meets the demands of the participation model of procedural justice, outlined in Section 3.3.4, by allowing states some form of role in matters directly affecting them and/or events on their territory. Moreover, a by-product of allowing states the ability to, at least to some extent, participate in the ICC referral process, and not have investigations thrust upon them, is that it could make them more willing to cooperate with the Court, as highlighted as a justification for self-referrals in Section 2.3.4. In turn, it could be argued that this potential increase in levels of cooperation could result in a greater

¹⁸⁴ Interview with British-based barrister 1, 25 June 2013.

degree of accuracy with regards to the ICC's efforts to pursue individual criminal accountability for international crimes,¹⁸⁵ thus, suggesting a degree of compatibility of the self-referral process with the demands of the accuracy model of procedural justice outlined in Section 3.3.2. Finally, it is also possible that the development of the self-referral process, which as noted in Section 2.3.4 was encouraged by Luis Moreno-Ocampo in the ICC's early years, was the product of a calculation which weighed the benefits of potentially successful investigations and prosecutions, buttressed by the suggested greater levels of cooperation brought by a self-referral, against the costs of the Court's external image with regards to its impartiality and independence. Such a calculation would suggest that the self-referral process displays a degree of compatibility with the balancing model of procedural justice outlined in Section 3.3.3. In short, it can be argued that the process of self-referrals can be said to be compatible with three of the models of procedural justice outlined in Section 3.3. Having discussed state referrals/self-referrals, this Section now turns its attention to UNSC referrals.

6.2.2 Security Council Referral

Article 13(b) of the *Rome Statute* depicts that the UNSC, acting in accordance with their Chapter VII powers from the United Nations (UN) Charter, can refer a situation where crimes have allegedly taken, or are taking, place (see ICC, 2011b: 11). Now, the potential role played by the UNSC in relation to the operation of the ICC was one of the, if not the, most controversial elements of the Court's design (see Bergsmo and Pejic, 2008; Williams and Schabas, 2008; Yee, 1999). From states favouring no role at all, such as India, to those who wanted to give the UNSC full control, such as the United States (US), the debate was fierce (see Bergsmo and Pejic, 2008: 597; Williams and Schabas, 2008: 567-569). Eventually, the so-

¹⁸⁵ Although, as outlined in Section 2.3.4, there is the potential that the accuracy be limited if the referring government expect, or are given, some form of leniency during the investigation process.

called 'Singapore compromise' was adopted, whereby the UNSC was given the power of referral, Article 13(b) (see ICC, 2011b: 11), and deferral, Article 16 (see ICC, 2011b: 13), rather than the power of approval initially outlined in the ILC's draft statute (see UN, 1994; see also Bergsmo and Pejic, 2008: 597; Williams and Schabas, 2008: 568-569). Furthermore, it was decided that the UNSC would be able to make the ICC's jurisdiction universal by awarding it the power to refer situations that occurred on the territory of a non-state party to the Court (see Williams and Schabas, 2008: 569).

Nonetheless, as outlined in Section 2.3.3 and further discussed in Section 7.4, the relationship between the ICC and the UNSC remains one of the most controversial. A core concern regarding the ICC/UNSC relationship was again outlined by the aforementioned British-based barrister interviewed for this thesis:

the fact that the Security Council has such a power when the vast majority of its [permanent] members do not subscribe to the Rome Treaty is an anomaly and you know a dilemma at the very heart of this concept of international justice. It just doesn't work. From the outside it looks totally hypocritical.¹⁸⁶

Now, although hypocrisy is a valid concern, as with the one raised in Section 6.2.1 it relates to issues of P5 practice, rather than the process of UNSC referrals itself. Of concern is China, Russia and the US' apparent willingness to use the ICC instrumentally when it suits them but their simultaneous reluctance or unwillingness to subject themselves to its jurisdiction and scrutiny. This is a problem because it creates a potential perception problem whereby the actions of certain permanent members of the UNSC can be viewed as hypocritical: how can

¹⁸⁶ Interview with British-based barrister 1, 25 June 2013.

you subject another state to the jurisdiction of an organisation that you yourself do not accept.

However, the focus of this Sub-Section is on the process of the UNSC referral, rather than the Security Council's practice which will be discussed in Section 7.4. On one level, the UNSC referral process can be considered compatible with two of the models of procedural justice outlined in Section 3.3. First, by being able to refer situations in states not party to the ICC, and thus make the Court's jurisdiction universal, the UNSC referral process could be argued to have been designed to increase the accuracy of efforts to pursue individual criminal accountability for international crimes by, theoretically at least, giving no individual *de facto* immunity before the ICC. This would make the UNSC referral process compatible with the demands of the accuracy model of procedural justice, outlined in Section 3.3.2, but, as will be argued in Section 7.4, a negative consequence of this is that the universal reach of the ICC, in reality, becomes tied to the politics of the Security Council. Second, given that the UNSC's referral process is grounded in the Security Council's role, under Chapter VII of the UN Charter, to maintain and uphold international peace and security, then it could be argued that they are compatible with the demands of the balancing model of procedural justice outlined in Section 3.3.3. This is because the UNSC's referral process, which gives the Security Council the power to choose whether or not to refer a situation, appears to be a reflection of a broader balancing calculation that weighs up the benefits of pursuing justice against any potential costs that this pursuit may pose to international peace and security. Thus, it can be argued that the UNSC referral process can be said to be compatible with two of the three models of procedural justice outlined in Section 3.3.

In addition to this compatibility with the demands of procedural justice, it is also possible to argue that the UNSC referral process meets other requirements of justice. On the one hand, as outlined in Section 3.2.1, the very essence of awarding the UNSC additional rights and duties within the regime of international criminal justice is grounded on the belief that they act as 'great responsables' and thus make decisions that produce mutually beneficial benefits for international society as a whole, a rationale compatible with John Rawls' 'difference principle' discussed in Section 3.2.1. On the other hand, it can be argued that the sanctioning of an ICC investigation is as much a political decision as a legal one because it involves an actor passing judgment on a state's ability or willingness to uphold duties held under international law. Building on this rationale of thinking, a representative from No Peace Without Justice (NPWJ) interviewed for this thesis argued that:

this [referral] power for the Security Council is good... in a way because, you know, it shields the ICC from, or should shield it from, allegations of being too political. Because, political decisions should be taken at the Security Council... So, if the Security Council decides to or not to refer Syria... that is a political decision and the nature of that decision rests with the Security Council not with the Prosecutor.¹⁸⁷

Here, it is useful to recall the discussion from Section 3.2.1 which identified a just arrangement as one where decisions are made by suitable institutions. In this context, the political controversy and nature of whether or not to refer non-state parties to the ICC means that such a decision, in order to be compatible with the definition of a just arrangement, should be made by a political rather than a legal institution. As such, it can be argued that the process

¹⁸⁷ Interview with representative from No Peace Without Justice (NPWJ), 4 September 2013.

of UNSC referral can be said to be compatible with the demands that when a distribution of rights and duties is unequal it is only just when it is intended to best serve the interests of all and that a just arrangement is one that ensures decisions are made by relevant institutions. Having discussed UNSC referrals, this Section now turns its attention to Chief Prosecutor referrals.

6.2.3 Chief Prosecutor Referral

Article 15 of the *Rome Statute* states that: “the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court” (see ICC, 2011b: 11-12). During the Rome Conference a number of delegations, but predominantly the US, opposed awarding the ICC’s Chief Prosecutor the power of referral with universal jurisdiction (see Williams and Schabas, 2008: 567-568; de Gurmendi, 1999). As explained by Jason Ralph, the opposition of the US, but perhaps other delegations as well, to having a Chief Prosecutor with universal jurisdiction was threefold: first, it challenged the self-declared role of states to be the final moral arbiters within international society; second, it undermines the important feature of international law which depicts that states have the right to contact themselves in or out of legal agreements; and third, an overzealous prosecutor, with the ability to pursue justice unchecked, could undermine broader political efforts to establish peace (Ralph, 2007: 96-104; see also Sadat and Carden, 2000). Here, it appears that opposition to an independent Prosecutor with universal jurisdiction, which would purport notions of what Hedley Bull called cosmopolitan justice (see Section 3.2.1), existed because it challenged the contemporary fabric of international society, which was built on notions of international justice (see Section 3.2.1), by removing or appearing to remove the right of states to determine their own futures. Furthermore, the concerns regarding an overzealous Prosecutor not only again relate to aspects of how the power could be used in practice, rather

than the process itself, but also perhaps highlight the importance of notions of justice as individual virtue, detailed in Section 3.4.5, in relation to the role ICC Chief Prosecutor role.¹⁸⁸

Nonetheless, because opposition to an ICC Prosecutor with universal jurisdiction was high, eventually a compromise was agreed whereby the jurisdiction of the Chief Prosecutor's *proprio motu* power of referral is limited to crimes that occur on the territory of, or are committed by nationals from, states parties to the *Rome Statute* (see Williams and Schabas, 2008: 567-568; de Gurmendi, 1999). Now, in relation to compatibility with the demands of procedural justice it could be argued that the Chief Prosecutor referral process relates to the accuracy model of procedural justice discussed in Section 3.3.2. A process whereby the ICC would not be reliant on state action or confirmation could be said to have been designed in an effort to improve the accuracy of the Court's efforts to ensure individual criminal accountability for international crimes, particularly those committed by government officials. This is because, void of any independent power of referral for the Chief Prosecutor, government officials could have used their status to protect themselves from prosecution by the ICC. However, it should be noted that the tethering of the jurisdiction of the Chief Prosecutor's referral power to ratification of the *Rome Statute* places limitations on the extent to which the process can broadly improve accuracy of individual criminal accountability efforts because many recalcitrant state regimes will refuse sign up to the ICC, meaning that to a large extent the accuracy of international criminal justice efforts remain tied to states or the UNSC. This said, such a limitation is not an indication of the process being considered incompatible with the accuracy model of procedural justice, just merely not as effective as it could have been. As such, it can be argued that the Chief Prosecutor referral

¹⁸⁸ The importance of justice as individual virtue in relation to the ICC's Chief Prosecutors will be explored further in Section 7.2.1.

process can be considered compatible with the theoretical demands of the accuracy model of procedural justice.

6.2.4 Summary

To summarise, this Section has argued that, although concerns exist as to how they have been implemented in practice, each referral type can be considered to be compatible with certain elements of this thesis' framework of justice outlined in Chapter Three. Self-referrals were considered compatible with three elements of the framework: the participation model of procedural justice (Section 3.3.4); the accuracy model of procedural justice (Section 3.3.2); and the balancing model of procedural justice (Section 3.3.3). UNSC referrals were viewed as compatible with four aspects of the framework: the accuracy model of procedural justice (Section 3.3.2); the balancing model of procedural justice (Section 3.3.3); serving the interests of the weakest and most vulnerable (Sections 3.1.1 and 3.2.1); and ensuring that decisions are made in the correct place (Section 3.2.1). Finally, Chief Prosecutor referrals were argued to be compatible with one element of the framework: the accuracy model of procedural justice (Section 3.3.2). These are important observations for this thesis because they affirm the main argument that, for the most part, it is stakeholder practice, not the ICC's purposes and procedures, which have been incompatible with the theoretical demands of justice. Having discussed the ICC's three referral processes, this Chapter now turns its attention to the process of complementarity.

6.3 Complementarity

The "centrepiece" of the ICC (see Leonard, 2012; Rastan, 2007), "the bedrock of the Rome Statute system" (see Intellmann, 2013), and one of the Court's "main governing principles" (see El Zeidy, 2002: 870), are just a few of the ways that commentators and practitioners have

described the process of complementarity. Subsequently, it can perhaps be inferred that complementarity is one of the, if not the, most important processes relating to the ICC's functioning. However, despite complementarity's apparent centrality to the ICC's operation and purpose,¹⁸⁹ and although it features heavily in the discourse, literature and policy discussions surrounding the Court,¹⁹⁰ complementarity perhaps remains one of the most complex, confusing and controversial aspects of the ICC's design.

Somewhat surprisingly, given its apparent centrality to the ICC's operations, the word complementarity does not appear in neither the *Rome Statute* (see ICC, 2011b) nor the *Rules of Procedure and Evidence* (see ICC, 2013b), although the word complementary does appear twice in the *Rome Statute's* Preamble and in Article 1 (see ICC, 2011b: 1 and 2).¹⁹¹ Thus, because complementarity has no specific article within the *Rome Statute*, commentators and policymakers have been able to subjectively identify its meaning. Markus Benzing highlighted this reality when he argued that complementarity has been used "by commentators to refer to the entirety of norms governing the relationship between the ICC and national governments" (Benzing, 2003: 592). In fact, Carsten Stahn argued that there are "two notions" of complementarity: one which depicts the ICC as a monitoring organisations and one which manages how states and the Court interact with one another (Stahn, 2008). As such, because there is no single understanding or definition of complementarity, it is important to outline how the concept is understood before the rationale for, and workings of, the process can be considered.

¹⁸⁹ See Section 5.2.

¹⁹⁰ There are that many academic publications, International Criminal Court (ICC) official documents, and Non-Governmental Organisation (NGO) reports that it would be impossible to mention them all.

¹⁹¹ This is perhaps more surprising given that the term complementarity was directly used during the Rome Conference, on 194 separate occasions by 87 different state delegations and 9 NGOs (see UN, 2002a).

For this thesis, complementarity is understood in two independent but interrelated ways. First, complementarity can be said to define the relationship that exists between states and the ICC. Here, the ICC's role can be said to complement, rather than override or replace, national justice systems. This understanding of complementarity was explained by former ICC President Sang-Hyun Song, during his remarks to St Petersburg State University on 14 May 2013:

the Rome Statute created much more than a Court. The ICC is the centrepiece of a new international justice system that consists of two main levels – national jurisdictions as the first line of defence against impunity, and the ICC as a failsafe system, a court of last resort. This is what we call the principle of complementarity.

The two levels of justice complement each other, together forming an unprecedented international structure intended to ensure individual accountability (2013b: 1).

The second way complementarity is understood by this thesis is as a means for deciding when the ICC's jurisdiction becomes active. In other words, complementarity helps identify the circumstances under which the ICC can begin to conduct investigations and prosecutions of its own and when it should surrender jurisdiction to national justice systems. Here, the language that appears in Article 17 of the *Rome Statute* is useful insofar as for the ICC's jurisdiction to be triggered there must be evidence that a state is genuinely "unable" or "unwilling" to investigate and prosecute the crimes themselves (see ICC, 2011b: 13-14). As explained by the Swiss delegation to the Rome Conference: "the establishment of the Court should not relieve national courts of their duty to punish individual acts that contravened the law of nations. Those authorities should be set aside only where they were not discharging their duty or were doing so inadequately" (see UN, 2002a: 108). Such an understanding of

complementarity is congruent with the first discussion because the ICC can be said to exist as a “failsafe” to national jurisdictions,¹⁹² ensuring that impunity for international crimes is not buttressed by the political situation of a state or the states domestic legal capabilities. However, although these discussions help understand how complementarity can be defined, they do not give an insight into how the process works or why it exists. These two questions will form the basis of the remaining discussion and analysis within this Section.

6.3.1 Why Complementarity?

Asides from the Extraordinary Chambers in the Courts of Cambodia (ECCC), which is uniquely embedded within the Cambodian justice system, all the other post-1991 international tribunals have exerted primacy over their corresponding domestic judicial systems.¹⁹³ So, why was a complementary jurisdictional system developed for the ICC? The primary answer to this question is that the process of complementarity was instrumental inasmuch as it was developed as a means for overcoming a strong legal obstacle to the establishment of a permanent international criminal court: internal, or domestic, state sovereignty (see Coban-Ozturk, 2014).¹⁹⁴ Explaining the obstacle to the ICC posed by internal state sovereignty, Roy Lee outlined that: “the subject matter [of the ICC] is the prosecution and enforcement of the law which are carefully guarded sovereign prerogatives. Under most existing legal systems of the world, national courts have jurisdiction over crimes committed within their territories,

¹⁹² As well as a “failsafe”, a number of other commentators have described the ICC as a “backstop” (see Roht-Arriaza, 2013: 387; Stahn, 2011: 210; Bibas and Burke-White, 2010: 647; Burke-White, 2008: 56; Pensky, 2008: 14).

¹⁹³ See: Article 9 of the International Criminal Tribunal for the former Yugoslavia (ICTY) Statute (see UN, 2009a: 7); Article 8 of the International Criminal Tribunal for Rwanda (ICTR) Statute (see UN, 2010: 63); Article 8 of the Special Court for Sierra Leone (SCSL) Statute (see SCSL, 2002: 3-4); and Article 4 of the Special Tribunal for Lebanon (STL) Statute (see STL, 2007: 13-14).

¹⁹⁴ Internal, or domestic, sovereignty refers to a state’s exclusive control over the core institutions within their given territory as well as everyone within that territory; including, law-making and enforcement and the judicial process (see Krasner, 2001: 5-12).

irrespective of who perpetrated the crime” (Lee, 1999: 5; see also Coban-Ozturk, 2014; El Zeidy, 2002).

Mohammed El Zeidy termed this sovereign right of criminal jurisdiction the “territorial principle” and noted that “only occasionally, when coerced by special circumstances” had states been willing to relinquish this right to an international body (see 2002: 870). Therefore, and as argued by Lee, if an international criminal court were to be accepted by states, its designers would have to “find a way whereby such a court would not impair but rather supplement the exercise of national jurisdiction” (1999: 27). The answer to Lee’s dilemma was a political compromise found in the shape of the complementarity process. In sum, the creation of the process of complementarity was instrumental because it was designed as a means for reconciling the sovereignty concerns of states with the demands for justice through individual criminal accountability from the wider international community (see Trahan, 2012: 580; Schiff, 2008: 92; Stahn, 2008: 88; Philippe, 2006: 380-381; Benzing, 2003: 600; El Zeidy, 2002: 870; Lee, 1999: 27).¹⁹⁵

This observation is important because it appears that this rationale for complementarity makes the process congruent with the balancing model of procedural justice, outlined in Section 3.3.3. The balancing model depicts that a just process is one that balances the costs and benefits of a transaction. In this context, the process of complementarity can be said to have been developed in order to balance the proposed sovereignty costs for states of losing sole jurisdiction over crimes committed on their territory with the purported benefits, see Section 1.3, of pursuing individual criminal accountability

¹⁹⁵ In fact, some even suggested that without the adoption of the complementarity process the ICC would not have been established (see Trahan, 2012: 578-579; Wrangle, 2010: 541; Jensen, 2001: 10).

against those most responsible for committing international crimes. This balancing role of complementarity was outlined by Michael Newton: “the complementarity principle is intended to preserve the power of the ICC over irresponsible states... but balances that supranational power against the sovereign right of states to prosecute their own” (2001: 26-27). Thus, this thesis would argue that the process of complementarity can be considered to be compatible with the balancing model of procedural justice outlined in Section 3.3.3.

6.3.2 How ‘Inability’ and ‘Unwillingness’ are Measured?

As with the definition of complementarity, there is also no formal criteria as to how notions of ‘unwillingness’ and ‘inability’ are to be measured. In general, it is widely accepted that domestic cases should be against the same individuals indicted by the ICC. However, after this there are two broad schools of thought as to how admissibility before the ICC on the grounds of ‘unwillingness’ or ‘inability’ can be fulfilled (see Heller, 2012b). In a slightly different, but still relevant, context, Kevin Heller defined these two broad schools of thought as: the “hard mirror thesis” and the “soft mirror thesis” (see 2012b). Heller described the ‘hard mirror thesis’ as requiring that international crimes be prosecuted as international crimes and that national justice systems must therefore prosecute ICC suspects for the same set of offences they face before the Court (see 2012b: 88-89). In other words, a case will be ruled admissible before the ICC, on the grounds of ‘unwillingness’ or ‘inability’, if the state in question cannot, or is refusing to, prosecute a suspect for the same offences they are accused of by the ICC. In contrast, Heller outlined that the ‘soft mirror thesis’ was more liberal in its interpretation and simply required that states be prosecuting a suspect and that the content of the case is irrelevant (Heller, 2012b: 97).¹⁹⁶ Put another way, a case will only be considered admissible

¹⁹⁶ According to Kevin Heller, this is the school of thought adhered to by most scholars (see 2012b: 97).

before the ICC, on the grounds of ‘unwillingness’ or ‘inability’, if the state in question is physically ‘unable’ or politically ‘unwilling’ to prosecute an ICC suspect.

The distinction between these two schools of thought is interesting for this thesis because they appear to reflect the debate within justice theory, outlined in Section 3.4, as to whether justice, in terms of notions of right or wrong, is defined in terms of process or outcome. Here, the ‘hard mirror thesis’ is reflective of a set of views that define justice in terms of process because the criteria for fulfilling the demands of complementarity requires the content of the cases to be substantively identical. Whereas, the ‘soft mirror thesis’ is reflective of a set of views that define justice in terms of outcome because the criteria for fulfilling the demands of complementarity merely requires that a suspect has been put on trial.

Now, from the early statements on the ICC’s role and complementarity made by Luis Moreno-Ocampo, the Court’s first Chief Prosecutor, it would appear that he advocated the ‘soft mirror thesis’:

the effectiveness of the International Criminal Court should not be measured by the number of cases that reach it. On the contrary, complementarity implies that the absence of trials before this Court, as a consequence of the regular functioning national institutions, would be a major success (2003a: 3).

Here, it can be argued that Moreno-Ocampo’s primary concern is getting states to hold trials nationally and prosecuting suspects, so the focus would appear to be on holding trials rather than their content or, put another way, justice in terms of outcome. However, in reality the ICC operates what it calls the ‘same-conduct test’ (see ICC, 2016d: 11; Heller, 2016: 644-663)

whereby for a case to be inadmissible before the ICC the challenging state must show that their domestic case is substantively the same as the one before the ICC. The ICC's Pre-Trial Chambers (PTC) and Appeals Chambers have consistently upheld the 'same-conduct test', arguing that domestic cases should "sufficiently mirror" (see ICC, 2014a: 34), be based on the "same conduct" (ICC, 2011c: 10), and be of "substantially the same conduct" (ICC, 2011d: 14) as those of the OTP. Thus, the ICC can be said to have adopted the position that the focus should be on making sure that cases cover the same substantive content or, in other words, justice in terms of process.

For this thesis, on a practical level, given the ICC's limited resources,¹⁹⁷ setting such a high admissibility criteria for states to meet appears troublesome. Furthermore, this thesis disagrees with the ICC's measurement of admissibility through the same-conduct test on a theoretical level as well because, as outlined in Section 3.4.6, this thesis favours an approach that primarily defines justice in terms of outcomes. In fact, this thesis is in agreement with Heller's latest work on complementarity, in which he argued that as long as a state is genuinely attempting to render justice, then the case should be ruled inadmissible before the ICC, regardless of the content of the case or the manner of the prosecution (Heller, 2016). However, these disagreements with the ICC's approach to complementarity are not enough to warrant this thesis identifying the process of complementarity as incompatible with the demands of justice, it just represents the idea that the ICC favours measuring justice in a different manner to the author.

Now, this is not to say that the ICC's process for addressing admissibility challenges cannot be improved. One issue with the current process is that it is run using an adversarial

¹⁹⁷ As will be discussed in Section 7.3.1.

system, whereby the OTP, defence, state and victims' lawyers all provide their own version of events and the role of the judges is to decide with whom they agree. However, as suggested by a representative from Human Rights Watch (HRW) interviewed for this thesis, there is reason to suggest that an inquisitorial system would be better.¹⁹⁸ Under an inquisitorial system, a judge, or panel of judges, would collate evidence from a number of sources, and could even sanction their own independent investigation, from which they would make an objective evaluation based on the evidence available to them and render a judgment. This is important for this thesis' discussion because it could be argued that such a change could improve the accuracy of outcomes in admissibility cases, and would thus increase the compatibility of the complementarity process with the demands of the accuracy model of procedural justice outlined in Section 3.3.2. Nevertheless, despite this thesis arguing that this would be a sensible and worthwhile improvement on the ICC's complementarity process, it is not enough to warrant arguing that the process is incompatible with the theoretical demands of justice. Instead, this observation merely affirms the argument made in Section 3.4.6 regarding the mutual dependency of notions of justice as process, outcome and virtue because it is suggesting that an improvement in the process would create outcomes that would be more accurate and subsequently could be considered more credible and legitimate.

6.3.3 Summary

To summarise, this Section has argued that, although improvements could be made that would perhaps increase the accuracy of outcomes, in general the process of complementarity can be said to be compatible with two elements of this thesis' framework of justice outlined in Chapter Three: the balancing model of procedural justice (Section 3.3.3); and the mutual

¹⁹⁸ Interview with representative from Human Rights Watch (HRW), 17 February 2014.

dependency of notions of justice as process, outcome and virtue (Section 3.4.6). This is an important observation for this thesis because it affirms the main argument that, for the most part, it is stakeholder practice, not the ICC's purposes and procedures, which have been incompatible with the theoretical demands of justice. Having discussed the process of complementarity, this Chapter now turns its attention to that of gravity.

6.4 Gravity

Article 17(d) of the *Rome Statute* states that a case or situation will be considered inadmissible before the ICC if it "is not of sufficient gravity" (see ICC, 2011b: 13). Similarly, during his remarks at a meeting with the foreign ministers of states parties in October 2005, Luis Moreno-Ocampo affirmed the integral position of gravity in relation to the ICC's functioning: "it was the wish of our [the ICC's] founders that the ICC should focus on the gravest situations in the world" (2005: 9).¹⁹⁹ However, as with complementarity there is very little detailed discussion on how gravity is defined or measured by the OTP, with the two selection criteria documents (see ICC, 2016d: 12-15; 2006c: 4-6) and the 2006 Prosecutorial Strategy (see ICC, 2006d: 5) only mentioning the concept in general. Moreover, but unlike the concept of complementarity, in this case notions of gravity and the idea of gravity thresholds have been greatly under-analysed within the literature surrounding the ICC (see Ochi, 2016; deGuzman, 2013; 2012b; 2009; Heller, 2010; SáCouto and Cleary, 2008; Murphy, 2006). This means that there is a shortage of discussion on what gravity is considered to mean by the OTP, how it is measured and why it is important? It is these questions that will form the focus of the remainder of the Sub-Section.

¹⁹⁹ The relationship between gravity thresholds and the ICC's mandate was discussed in Section 5.3.

6.4.1 Defining and Measuring Gravity

Although, as outlined above, the OTP's two documents on situation and case selection, published in 2006 and 2016, offer limited explanation as to how notions of gravity are measured by the Prosecutor's Office, they do outline four criteria: scale of the crimes, nature of the crimes, manner of the commission of the crimes, and impact of the crimes (see ICC, 2016d: 13; 2006c: 5). More broadly, these gravity criteria have been categorised and defined under two broader headings: quantitative gravity and qualitative gravity (see Stahn, 2011: 243-244; Heller, 2010; Schabas, 2008a: 736-748).

Quantitative gravity relates to the scale of crimes criteria and defines and measures gravity in terms of the number of victims, both direct and indirect, created by the crime (see ICC, 2016d: 13; 2006c: 5). According to the OTP reports, death-toll figures are the primary means for measuring the scale of crimes because they are the most reliable statistics available, however, the number of victims created by other crimes, particularly those that violate personal integrity such as rape and forced displacement, are also considered where possible (see ICC, 2016d: 13; 2006c: 5). This quantitative criteria first became visible during the OTP's explanation, in 2006, as to why the Iraq situation was considered to be inadmissible before the ICC:

a key consideration is the number of victims of particularly serious crimes, such as wilful killing or rape. The number of potential victims of crimes within the jurisdiction of the Court in this situation – 4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment – was of a different order than the number of victims

found in other situations under investigation or analysis by the Office (see ICC, 2006h: 8-9).²⁰⁰

In sum, the quantitative gravity criteria can be said to represent an attempt to create an objective criteria for measuring gravity that focuses on consequences alone; although this statistical, almost scientific approach, to measuring gravity has been criticised by both William Schabas (see 2008a: 747-748) and Kevin Heller (see 2010) because it often neglects to consider the more nuanced dimensions of the crimes.

This apparent standalone inadequacy of quantitative gravity leads onto the notion of qualitative gravity which relates to the nature of crimes, manner of commission of crimes and impact of crimes criteria outlined above. Here, the nature of crimes concerns the specific type of offence committed, including wilful killings, rape, forced displacement, discriminatory crimes, gender crimes and crimes against children, with deliberate deaths and rape considered to be the gravest offences (see ICC, 2016d: 13; 2006c: 6).²⁰¹ The manner of the commission of crimes relates to how the crimes were executed, focussing on ideas like: were they result of clear abuses of position or power, were they committed against vulnerable groups such as women, children or the disabled, or were they the result of organised, planned and/or systematic attacks (see ICC, 2016d: 13; 2006c: 6)? Finally, the impact of crimes considers the broad consequences of the crimes and can include: disturbing regional stability, causing severe economic, environmental, institutional or social damage, or specifically

²⁰⁰ The same quantitative criteria was again used by the Prosecutor in their *Article 53(1) Report on the Situation on Registered Vessels of Comoros, Greece and Cambodia* which explained their decision not to proceed with an investigation into the Flotilla Incident on the grounds that: “the total number of victims of the flotilla incident reached relatively limited proportions as compared, generally, to other cases investigated by the Office” (see ICC, 2014b: 56).

²⁰¹ The nature of the crimes criteria is important because it recognises that not all conflict related deaths occur as a result of international crimes.

targeting internationally sanctioned relief and assistance personnel (see ICC, 2016d: 13; 2006c: 6).

The idea that the gravity of a crime can be measured in accordance with these criteria and by more than just the number of victims created was first applied to the *Abu Garda* case in the *Prosecutor's Application under Article 58* submitted on 20 November 2008 where it was argued that despite the case relating to a relatively low number of victims, just eight deaths, the case meets the required gravity threshold because attacks against peacekeeping operations offend "the very heart of the international legal system established for the purpose of maintaining international peace and security" (see ICC, 2008: 5).²⁰² Moreover, Schabas echoed the idea that as a standalone measure the number of victims is insufficient on the basis that the context of the attacks or conflict, particularly whether they were self-defence or aggressive, are important considerations because the gravity of the crime must be linked to the number of broader international norms and values violated by its commission (see 2008a: 747-748). In short, qualitative gravity is a reflection of a much more subjective criteria that considers the acts themselves rather than relying solely on consequences.

This quantitative/qualitative divide in relation to gravity is interesting for this discussion because it appears to reflect the broader debate within justice theory regarding whether justice is measured in terms of outcomes or processes, as discussed in Section 3.4. In this context, quantitative gravity, with its focus on the consequences of the crimes, can be said to reflect an idea that measures justice in terms of outcomes. Contrastingly, qualitative

²⁰² Interestingly, in its *Decision on the Request of the Union of the Comoros to Review the Prosecutor's Decision not to Initiate and Investigation*, Pre-Trial Chamber I (PTC I) accepted the appeal of the Comoros and asked the Prosecutor to reconsider its decision not to open an investigation on the basis that the crimes met the qualitative gravity threshold (see ICC, 2015b); a decision which was upheld by the Appeals Chamber on 6 November 2015 (see ICC, 2015c).

gravity, which considers the acts themselves not just the consequences, can be said to relate to an idea that measures justice in terms of process. Now, whereas often there is one dominant element, in the case of measuring gravity before the ICC neither the quantitative nor the qualitative method is prioritised. This idea was outlined by Pre-Trial Chamber I (PTC I) in its *Decision on the Confirmation of Charges* in the *Abu Garda* case delivered on 8 February 2010: “the gravity of a given case should not be assessed only from a quantitative perspective, i.e. by considering the number of victims; rather, the qualitative dimension of the crime should also be taken into consideration” (see ICC, 2010b: 16).

This decision by PTC I is interesting because it appears to reflect the mutually dependent relationship between notions of justice as process and justice as outcome discussed in Section 3.4.6. Here, it can be argued that the quantitative criteria is required because it produces an objectively observable and comparable component for decision-making. However, a focus purely on statistics ignores other important measures of gravity, such as the norms and values violated by the crimes, as well as leaves the ICC open to criticism by highlighting potential areas of selectivity. This means that the qualitative criteria can be said to be required in order to give both meaning to decisions and outcomes as well as giving them a degree of legitimacy and societal acceptance. In short, it can be argued that measuring the gravity of crimes in both quantitative and qualitative terms is compatible with the argument from Section 3.4.6 pertaining to the mutually dependent relationship between notions of justice as process, outcome and virtue.

6.4.2 Why Gravity?

The idea that the intention of international criminal law is to conduct symbolic prosecutions of a small number of high-ranking officials considered to be most responsible for the worst

crimes was outlined in Section 5.3. However, the gravity thresholds discussed above were perhaps designed for a broader instrumental reason. The rationale for the gravity thresholds is grounded in the argument that they are the best means for the ICC to manage its potentially large workload against its limited resources (see Heller, 2010: 229; deGuzman, 2009: 1403; El Zeidy, 2008: 36; SáCouto and Cleary, 2008: 819; Robinson, 2003: 485 and 494). In the context of this thesis' discussion on justice, such an observation is important because the gravity process can be said to relate to the demands of the balancing model of procedural justice discussed in Section 3.3.3. Here, it is plausible that the gravity process was designed as a means for balancing the benefits of prosecution violations of international criminal law with the financial costs of doing so. The ICC does not have an unlimited budget, so by choosing to prosecute a select number of severe crimes, it can be said to be a means for achieving some of the benefits of international prosecutions whilst being considerate of the costs of doing so. In sum, it can be argued that the gravity process is compatible with the demands of the balancing model of procedural justice, outlined in Section 3.3.3, because it is reflective of a process designed in relation to a calculation between the benefits of prosecuting international crimes and the financial cost of carrying out said prosecutions.

6.4.3 Summary

To summarise, this Section has argued that the process of selecting situations and cases before the ICC in accordance with gravity thresholds can be said to be compatible with two elements of this thesis' framework of justice outlined in Chapter Three: the balancing model of procedural justice (Section 3.3.3); and the mutual dependency of notions of justice as process, outcome and virtue (Section 3.4.6). This is an important observation for this thesis because it affirms the main argument that, for the most part, it is stakeholder practice, not the ICC's purposes and procedures, which have been incompatible with the theoretical

demands of justice. Having discussed notions of gravity, this Chapter now turns its attention to the cooperation process.

6.5 Cooperation

On 31 October 2014, during a meeting with government officials from CAR, ICC Chief Prosecutor Fatou Bensouda stated that: “cooperation underpins efforts to deliver justice to the victims” in CAR (as cited in ICC, 2014c). Now, although this statement was specific to the CAR II situation, its message is relevant to the ICC as a whole: cooperation is vital to the ICC’s operation and its success. A possible indication of the importance of cooperation for the ICC is the amount of space and time dedicated to its discussion. For instance, Part 9 of the *Rome Statute* focuses entirely on cooperation, with an emphasis on the legal obligation of states parties to cooperate with the ICC and the various areas where cooperation is required (see ICC, 2011b: 55-64).²⁰³ Additionally, every year since 2007 the ASP’s Bureau have presented a report on cooperation to the annual conference, since 2010 the ICC’s Registry have presented their own report, and since 2012 the ASP’s Bureau have also presented a report on non-cooperation (see ICC, 2017d).²⁰⁴ Similarly, and perhaps further affirming the importance of cooperation, global NGOs continually apply pressure to states to increase their cooperation with the ICC (see HRW, 2014; PGA, 2014; NPWJ, 2013), and the delegations of states supportive of the Court often use the UN, both the Security Council and General Assembly, as a platform to purport the need for states to increase their cooperation with the ICC (see UN, 2015e). Finally, nearly every respondent interviewed for this thesis considered cooperation as one of the primary challenges facing the ICC.

²⁰³ Cooperation is the only procedural concept to have its own dedicated section of the *Rome Statute*.

²⁰⁴ In fact, the ASP’s website has an entire section dedicated to non-cooperation (see ICC, 2017g).

Now, many of these observations, as well as the continued efforts to promote the need for cooperation, could perhaps indicate that it has not been to the required level. This suggestion may, as will be discussed in Chapter Seven (see also Barnes, 2011), have validity, but this is an issue pertaining to practice and the focus of this Chapter is one process. As such, the remainder of this Sub-Section will be dedicated to discussing cooperation as a concept and the cooperation process before the ICC. In doing this, the Sub-Section will outline what cooperation looks like before the ICC and consider some possible limitations to it being received.

6.5.1 Understanding Cooperation before the ICC

As outlined by Matthew Cannock, it is an “oft-used adage that the Court does not have its own police force... [and] is therefore full dependent on States Parties to ensure that its decisions are implemented and enforced” (2016: 319). However, although the enforcement of decisions, particularly arrest and surrender requests, is an important aspect of cooperation with the ICC, not least because without suspects in custody the Court cannot operate,²⁰⁵ arrest and surrender is not the only area where cooperation is required and states are not the only actors from whom cooperation is needed. In fact, it is possible that this seemingly narrow understanding of cooperation before the ICC, with an almost sole focus on matters pertaining to arrest and surrender, may have led to the development of a narrative purporting the idea that there has been a widespread lack of cooperation with the Court. The idea that cooperation with the ICC expands beyond merely arrest and surrender requests was outlined by the representative from Human Rights Watch interviewed for this thesis, who responded to a question about a lack of cooperation with the Court with the statement: “it really

²⁰⁵ Article 63 of the *Rome Statute* prohibits the conduct of trials *in absentia* unless the accused is continually disrupting proceedings (see ICC, 2011b: 41).

depends on what type of cooperation we talk about”.²⁰⁶ Moreover, in its very first report on cooperation, published in 2007, the ASP’s Bureau outlined what it called a “dynamic approach” for cooperation, which divided ICC cooperation into seven “clusters” that identified a range of areas for assistance and actors to provide it (see ICC, 2007b: 4-15).²⁰⁷ But, since the presentation of this ‘dynamic approach’ in 2007, none of the ASP Bureau’s subsequent reports, nor those from the ICC’s Registry, have mentioned or expanded on this idea, and mentions to it in the academic literature are infrequent and lack detail.²⁰⁸

In light of these observations, in order to fully understand the nature of the ICC’s cooperation process, this thesis would argue that the concept needs to be broken down into smaller elements, so as not to fall foul of focussing merely on matters of arrest and surrender.²⁰⁹ Furthermore, it is important to outline all the actors that the ICC’s requires cooperation from, so not to solely concentrate on states parties.²¹⁰ This thesis has illustrated the forms and sources of cooperation in Figures 6.1 and 6.2 respectively, which draw on, but are not solely influenced by, the ASP Bureau’s 2007 report.

Beginning with the forms of cooperation displayed in Figure 6.1, it can be seen that this thesis divides them into four broad categories: normative, physical, resource and rhetorical. Normative cooperation exists when actors demonstrate that they share the ICC’s long-term vision and adhere to the ideas, norms and values that guide its practice. Normative

²⁰⁶ Interview with representative from Human Rights Watch (HRW), 17 February 2014.

²⁰⁷ The seven clusters were: general legal mechanics, diplomatic and public support, cooperation in support of analysis, investigations, prosecutions and judicial proceedings, arrest and surrender, witness protection and support, logistics and security, and personnel (see ICC, 2007b: 4-15).

²⁰⁸ The only reference to the ‘dynamic approach’, albeit brief, this author found in the literature was made by Carsten Stahn (see 2011: 272-273).

²⁰⁹ This is not to say that arrest and surrender is not important, just that there are other forms of cooperation that exist.

²¹⁰ As above, this is not to say that state party cooperation is not arguably the most important, not least because they are the only actors legally obliged to cooperate, just that the ICC does require the cooperation of other actors.

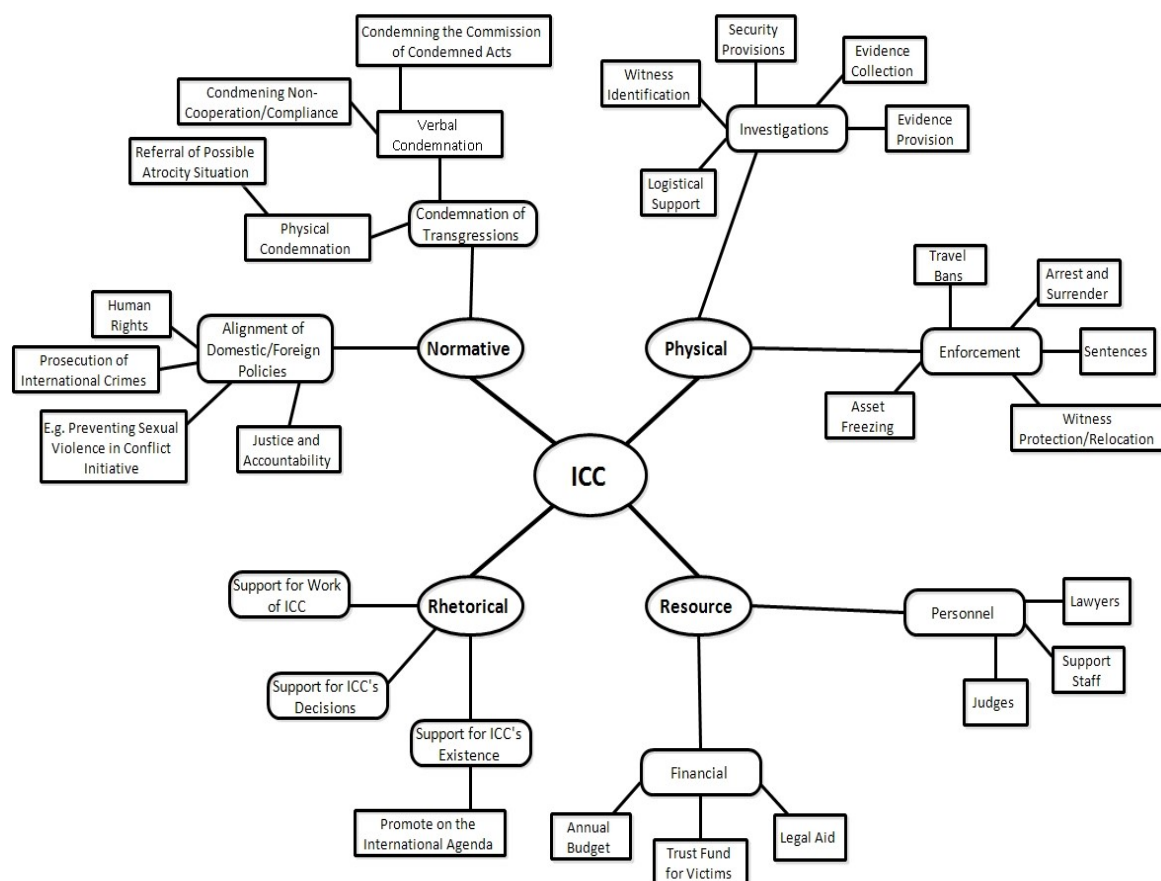


Figure 6.1 - Diagram Showing Forms of ICC Cooperation

cooperation can be displayed in two-ways: by consistently condemning transgressions of the ICC regime, such as the commission of mass atrocity crimes or instances of non-cooperation;²¹¹ and by aligning domestic and foreign policies with the norms and values promoted by the ICC.²¹² This condemnation can be either physical, in the form of a referral, or verbal, in the form of an official statement. Physical cooperation refers to the provision of practical assistance to the ICC, so that it can achieve its overall mandate and day-to-day tasks. Physical cooperation is required in two areas: investigations, where support is needed in relation to the collection and provision of evidence, identification of witnesses, and logistical and security assistance; and enforcement, where more coercive or forceful support is

²¹¹ Condemnation could be physical, in the form of a referral, or verbal, in the form of an official statement.

²¹² An example of this would be the United Kingdom (UK) Foreign and Commonwealth Office's (FCO's) Preventing Sexual Violence in Conflict Initiative (PSVI) (see Gov.UK, 2017).

required to implement travel bans and asset freezes on suspects, witness protection and relocation schemes, arresting and surrendering fugitives, and incarcerating those found guilty.

Resource cooperation involves actors providing the ICC with the finances to achieve its goals. Finances are required in three areas: the annual budget and contingency fund, which allows the ICC to operate on a day-to-day basis; contributions to the Trust Fund for Victims (TFV), to allow for compensation to be paid to victims; and legal aid, so that suspects can be provided with the required legal advice and representation. Finally, rhetorical cooperation involves showing verbal support for the ICC in international, regional and domestic forums. Rhetorical cooperation exists in three forms: showing support for the work of the ICC, particularly its investigations and prosecutions; displaying agreement with ICC decisions, which can help to legitimise its work; and demonstrating backing for the ICC's general existence, by promoting the Court on international agendas and by directly referencing it in subject related forums where it is not invited.²¹³

Moving on to the sources of cooperation, illustrated in Figure 6.2, it can be seen that this thesis identifies six groups of actors from whom cooperation is either needed or would at the very least be beneficial: states, legal professionals, victims and affected communities, inter-governmental organisations (IGOs), civil society groups and the United Nations (UN) bodies. States are perhaps the most important source of cooperation because, as the primary actors within international society, they are arguably best placed and resourced to offer

²¹³ Examples of such forums could include the UNSC's meetings on sexual violence in conflict or children in armed conflict.

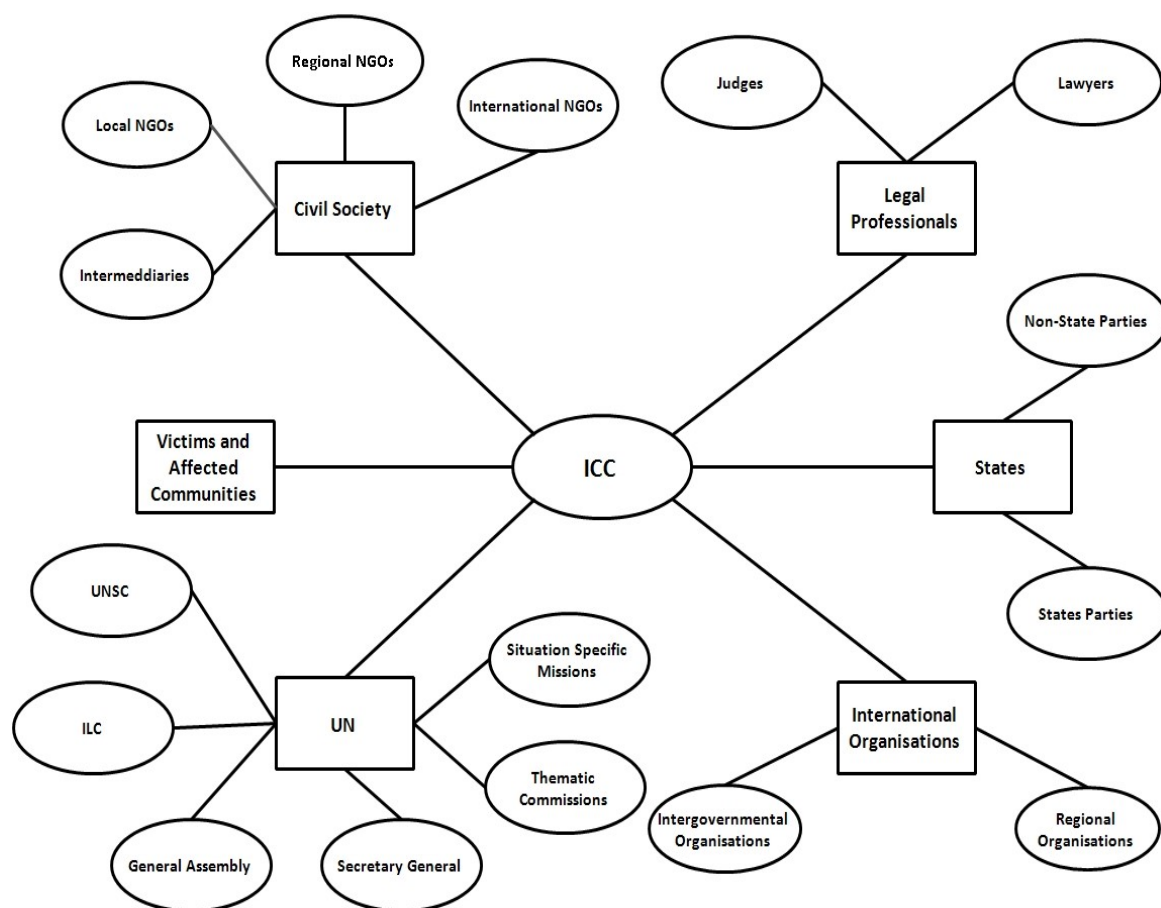


Figure 6.2 - Diagram Showing Sources of ICC Cooperation

assistance to the Court. Moreover, states parties are legally obliged to cooperate with the ICC and as such can be expected to offer all four of the abovementioned forms of cooperation.²¹⁴ Legal professionals are a vital source of cooperation because they possess specialist knowledge and experience in the ICC's areas of focus. This makes legal professionals well-placed to offer constructive criticism on the ICC's procedures and practices as well as recommendations for improvement.²¹⁵ Furthermore, legal professionals, particularly domestic judges and lawyers, should have respect for the due process of law and as such should offer the ICC rhetorical cooperation by championing the legitimacy of its decisions,

²¹⁴ Non-states parties are under no obligation to cooperate but can offer the ICC support if they so wish.

²¹⁵ For example, the International Bar Association (IBA) has an ICC programme that offers such recommendations (see IBA, 2017b).

regardless of if they agree with the verdicts, as long as they were delivered in accordance with the demands of due process.

Victims and affected communities are required to offer physical cooperation to the ICC by making themselves available for interview and cross-examination, so that cases can be built and subsequently trials held. However, states must also be prepared to offer the required levels of protection to witnesses once they have given evidence. IGOs, such as regional organisations like the European Union (EU), can provide the ICC with normative cooperation by aligning the policies of its members in favour of the ICC, so that decisions regarding, and cooperation with, the Court are more unified and consistent. Civil society actors, such as intermediaries and Non-Governmental Organisations (NGOs), can offer a number of forms of cooperation. Intermediaries offer physical cooperation to the ICC by helping them identify and gain access to potential witnesses, without which there may be no cases or trials (see Dranginis, 2011). NGOs provide the ICC with rhetorical cooperation by defending its existence and practice as well as physical cooperation by publishing research findings that, if verified, can be used as a source of evidence by the Court.

Finally, the various UN bodies can offer many forms of cooperation to the ICC. The UNSC can provide normative cooperation to the ICC by referring situations to it, physical cooperation by applying political leverage to non-cooperative states, and resource cooperation if it were to choose to offer financial assistance alongside its referrals. The General Assembly, Secretary General, International Law Commission (ILC), and thematic missions, such as the Office of the High Commissioner for Human Rights (OHCHR), can all offer rhetorical cooperation by championing the ICC's existence and practice. Lastly, the situation

specific missions, which often exist in the same locations as ICC investigations,²¹⁶ can offer physical cooperation assisting the Court's staff by providing transport, security, accommodation, and identifying witnesses and victims, so long as it does not interfere with the UN's impartiality.

In short, cooperation with the ICC can take many forms and can come from a number of sources. However, the ICC's cooperation process also potentially fulfils some of the theoretical demands of procedural justice outlined in Section 3.3. First, it could be argued that cooperation not only serves the interests of the ICC, by enabling it to operate, but that it also helps buttress the desires of stakeholders to participate in proceedings that affect them, as discussed in Section 3.3.4. The broad spectrum of the ICC's cooperation regime gives a lot of areas for potential participation by stakeholders and allows for a number of different stakeholders to participate either directly or indirectly. As such, it can be argued that the ICC's cooperation process is compatible with the theoretical demands of the participation model of procedural justice outlined in Section 3.3.4 because it potentially helps encourage and facilitate participation in ICC transactions.

Second, the ICC has certain limitations in its enforcement capabilities and the political leverage it can apply to non-cooperative states. However, it could be argued that the impact of these limitations could be lessened through strong cooperation with the ICC from a range of different actors in a number of different areas. This is important because if the ICC's limitations can be reduced through cooperation then it is possible that the accuracy of the

²¹⁶ Currently, five of the nine territories where ICC investigations are taking place also have a UN mission present: the Central African Republic (CAR), United Nations Multi-dimensional Integrated Stabilization in the Central African Republic (MINUSCA); the Democratic Republic of Congo (DRC), United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MINUSCO); Darfur, African Union/United Nations Hybrid Operation in Darfur (UNAMID); Libya, United Nations Support Mission in Libya (UNSMIL); and Mali, United Nations Multi-dimensional Integrated Stabilization Mission in Mali (MINUSMA).

Court's outcomes could be increased. Thus, because the cooperation process of the ICC has the potential to increase the accuracy of outcomes it can be said to be compatible with the theoretical demands of the accuracy model of procedural justice described in Section 3.3.2. Nonetheless, despite being able to potentially reduce the limitations on the ICC, and although it can be said to be compatible with some of the theoretical demands of procedural justice, there are still some limitations with the Court's cooperation process, most notably what this thesis will call the cooperation paradox.²¹⁷

6.5.2 The Cooperation Paradox and the Process of Non-Cooperation

The main idea behind the ICC's cooperation paradox is that the mandate and design of the Court can actually obstruct the cooperation it receives. The existence of the ICC as a court of last resort, complementary to national jurisdictions, as outlined in Sections 5.2 and 6.3, actually poses an impediment to cooperation with the Court because if states are unable or unwilling to investigate or prosecute themselves then it is likely that they will be unable or unwilling to effectively cooperate. This reality was termed a "paradox" by a representative from the Office of the Prosecutor (OTP) interviewed for this thesis who argued that:

The ICC is supposed to step in as the result of national failure... [But] the ICC is... reliant on proxy enforcement... states supposedly putting all their law enforcement tools as the disposal of the Court... But, when you are investigating in Mali or Eastern DRC, what are the national law enforcement tools available to you...? None, they don't exist and if they did exist you wouldn't even be there. So, you are there because they don't exist but then you can't do your job because they don't exist... It is like a catch twenty-

²¹⁷ As will be shown below, the paradox idea was developed from an interview with a representative from the Office of the Prosecutor (OTP).

two, the same deficiencies that warrant ICC investigations will hamper the ability of the Court to be effective.²¹⁸

This observation by the representative from the OTP is important for two reasons: first, it identifies how difficult attaining cooperation from actors can be for the ICC; and second, it can help us develop a further understanding of the issue of non-cooperation with the ICC. It is the last of these observations that the remainder of this Sub-Section will focus.

Sometimes, non-cooperation can seemingly exist as an umbrella term but, given the abovementioned observations, this is arguably not the case as perhaps not all instances of non-cooperation are contextually the same. This idea was referred to by a representative from HRW interviewed for this thesis who argued that it is important to distinguish between instances of “voluntary” and “involuntary” non-cooperation, both of which are particularly relevant to the area of arrest and surrender requests.²¹⁹ Voluntary non-cooperation is congruent with the unwillingness complementarity criterion and exists when an actor is able to cooperate but consciously chooses to ignore the ICC’s requests to do so. In contrast, involuntary non-cooperation relates to the inability complementarity criterion and occurs when an actor is physically unable to offer the ICC the cooperation it requires.

This idea of categorising non-cooperation into voluntary and involuntary forms is interesting for this thesis because the discussion is relatable to the broader debate between notions of justice as process and outcome discussed in Section 3.4. Here, it could be argued that an approach which considers all instances of non-cooperation the same, is an example of measuring justice with a focus on outcomes or consequences. Whereas, an approach, such

²¹⁸ Interview with representative from the Office of the Prosecutor (OTP), 14 May 2014.

²¹⁹ Interview with representative from Human Rights Watch (HRW), 17 February 2014.

as the one outlined above, which attempts to contextualise instances on non-cooperation, and subsequently distinguish between those actors unwilling to cooperate and those unable to cooperate, reflects justice being measured with a focus on process. This idea is important for our discussion because it appears to correspond to the argument pertaining to the mutual dependency of notions of justice as process, outcome and virtue outlined in Section 3.4.6. The main focus of analyses of non-cooperation should be, in the first instance, the non-cooperation itself or the outcome/consequence of the action. However, in order to fully contextualise and understand if an instance of non-cooperation is of concern, an equal amount of focus needs to be given to the reasons behind the non-cooperative action. Put another way, was it a case of voluntary or involuntary non-cooperation, with the former being far more concerning than the latter? In sum, it can be argued that highlighting the importance of adopting a more nuanced understanding of instances of non-cooperation can be said to be compatible with the argument outlined in Section 3.4.6 pertaining to the mutual dependency of notions of justice as process, outcome and virtue because knowing the context of the non-cooperation gives more meaning to the outcomes.

6.5.4 Summary

To summarise, this Section has argued that the ICC's cooperation process can be considered compatible with two elements of this thesis' framework of justice outlined in Chapter Three: the participation model of procedural justice (Section 3.3.4); and the accuracy model of procedural justice (Section 3.3.2). Moreover, this Section suggested that some limitations to the ICC's operations, derived from its mandate and design, may inhibit the cooperation the Court can receive and as such a more comprehensive understanding of instances of non-cooperation, which distinguished between instances of voluntary and involuntary non-cooperation, is required. This observation was considered to be compatible with the

argument from Section 3.4.6 relating to the mutual dependence of notions of justice as process, outcome and virtue. These are important observations for this thesis because they affirm the main argument that, for the most part, it is stakeholder practice, not the ICC's purposes or procedures, which have been incompatible with the theoretical demands of justice.

6.6 Chapter Summary

To summarise, this Chapter analysed four of the main procedures from the ICC, the referral process, the complementarity process, the gravity process and the cooperation process, and the extent to which their design and interpretation can be considered to be compatible with elements of the normative framework of justice outlined in Chapter Three.

With regards, to the referral process, it was noted that the three types of referral, state/self, UNSC and Chief Prosecutor, were compatible with different elements of this thesis' theoretical framework of justice. For self-referrals, it was argued that they were compatible with three aspects of this thesis' framework of justice: the participation model of procedural justice (Section 3.3.4) because it allows for states to indirectly participate in proceedings; the accuracy model of procedural justice (Section 3.3.2) because it is argued that it can help buttress cooperation; and the balancing model of procedural justice (Section 3.3.3) because the emphasis on self-referrals represents a weighing of the benefits of more willing cooperation against the costs of diminishing the ICC's external image. For UNSC referrals, it was argued that they were compatible with four elements of this thesis' framework of justice: the accuracy model of procedural justice (Section 3.3.2) because it enables the referral of situations outside of the *de jure* jurisdiction of the ICC; the balancing model of procedural justice (Section 3.3.3) because involving the Security Council at all in decisionmaking is

perhaps an example of a calculation between the benefits of international prosecution with the costs they could cause to international peace and security; serving the interests of the weakest and most vulnerable (Section 3.1.1 and 3.2.1) because the rationale of awarding the UNSC the power of referral is that they use it to provide mutual benefits for all; and ensuring that decisions are made in the correct place (Section 3.2.1) because the Security Council, a political institution, not the ICC, a legal institution, is being asked to rule over matters of politics. Finally, for Chief Prosecutor referrals, it was argued that they were compatible with one element of this thesis' framework of justice: the accuracy model of procedural justice (Section 3.3.2) because they allow the Chief Prosecutor to refer situations without the need for state or UNSC verification.

With regards to complementarity, it was argued that the design of the process is compatible with the balancing model of procedural justice (Section 3.3.3) because it was designed as a means for balancing the perceived benefits of international prosecutions with the concerns pertaining to sovereignty costs of states. Furthermore, the interpretation of the complementarity process was debated between a means which measured justice in terms of process and one that measured it in terms of outcomes. This Section argued that the ICC should, although it does not currently, focus primarily on outcomes, so long as certain minimal procedural requirements, such as the same person criterion, were met. This suggestion, which was posited as a potential improvement over the current situation, was noted as being compatible with the argument pertaining to the mutual dependency between notions of justice as process, outcome and virtue (Section 3.4.6).

With regards to gravity, it was argued that a rationale for gravity thresholds, weighing the benefits of international prosecution against the financial costs of doing so, is compatible

with the balancing model of procedural justice (Section 3.3.3). Moreover, it was noted that gravity is measured both quantitatively, where the focus is on outcome, and qualitatively, where the emphasis is on process, which was noted as being representative of, and thus compatible with, the argument regarding the mutual dependency of notions of justice as process, outcome and virtue (Section 3.4.6).

Finally, with regards to cooperation, it was argued that the general process was compatible with two elements of the thesis' framework: the accuracy model of procedural justice (Section 3.3.2) because cooperation could help overcome some of the ICC's enforcement limitations; and the participation model of procedural justice (Section 3.3.3) because the ICC's cooperation regime gives a lot of room for a number of stakeholders to participate both directly and indirectly in ICC proceedings. Furthermore, it was noted that the ICC's design and mandate posed a potential obstacle to cooperation and as such it was important to contextualise instances of non-cooperation between voluntary and involuntary. It was then argued that the basis of this distinction was reflective of, and as such compatible with, the argument regarding the mutual dependency of notions of justice as process, outcome and virtue (Section 3.4.6).

In short, despite some limitations to effectiveness, the compatibility, in general, of the ICC procedures discussed, the referral process, the complementarity process, the gravity process and the cooperation process, with elements of this thesis' theoretical framework of justice, as outlined in Chapter Three, is important because it affirms the main argument of this thesis that, for the most part, it is stakeholder practice, not the ICC's purposes or procedures, which have been incompatible with the theoretical demands of justice. Having discussed four of the main procedures pertaining to the ICC's operation, and analysed their

compatibility with this thesis' normative framework, the next Chapter will address the topic of stakeholder practice.

Chapter Seven

Stakeholder Practice within the International Criminal Court System

7.1 Introduction

Having previously considered purposive and procedural aspects in relation to the International Criminal Court (ICC), this Chapter will focus on the area of stakeholder practice. For this Chapter, stakeholder practice relates to three independent but interrelated areas: the selection of situations, the conduct of investigations and prosecutions, and the ability of the Court to operate on a day-to-day basis. Moreover, although Section 6.5 identified a number of potential ICC stakeholders, for issues of time and space this Chapter will focus on four, who have been chosen by virtue of the influence they are able to exert over the Court's workings. The first two stakeholders considered are the Office of the Prosecutor (OTP) and its Chief Prosecutor. These were chosen because they are responsible for decision-making in the most controversial and publicly visible areas of the ICC's operations. The third stakeholders covered are the states parties to the *Rome Statute*, considered in both their collective and individual form. The states parties to the *Rome Statute* were chosen because they are the actors not only best placed, but also most obliged, to provide the ICC with the support it requires to be successful. The final stakeholder to be discussed is the United Nations Security Council (UNSC), which will be identified as a collective decision-making body of states, although the disproportionate influence of the permanent, veto wielding members will be noted. The UNSC was chosen for two reasons: first, they have the power to refer situations that occur on the territory of non-member states to the ICC; and second, because it could be argued that, as a collective body, the Security Council possesses the material and political capabilities to aid the Court in its search for international criminal justice.

In short, the aim this Chapter is to analyse the extent to which the abovementioned four stakeholders, chosen because they are considered to be primarily responsible for determining, guiding and influencing the ICC's operations, have acted in a manner that can be considered compatible with elements of the theoretical justice framework outlined in Chapter Three. Moreover, the Chapter will build on parts of the purposive and procedural discussions, held in Chapters Five and Six, by applying some of the conclusions and observations to the stakeholder practices discussed. In order to do this, the Chapter will be divided into three sections, each of which will focus on, and analyse, the practices of one of the abovementioned three stakeholders. The first Section considers the practice of the OTP and the Chief Prosecutors in the areas of situation selection, and the conduct of investigations and prosecutions. The second Section concentrates on the actions of the states parties to the *Rome Statute*, in the areas of funding and arrest and surrender compliance. The final Section focuses on the practice of the UNSC, in the areas of ICC referrals and post-referral support.

7.2 The Practice of the OTP

The OTP is the independent branch of the ICC tasked with the selection of situations and conducting investigations and prosecutions (see Schabas, 2011a: 377-382; HRW, 2008b: 30-72).²²⁰ This organ is headed by a Chief Prosecutor, currently Fatou Bensouda,²²¹ who is responsible for guiding and overseeing the work of the Office as well as acting as its external face (see Schabas, 2010c: 574-584; CICC, 2003: 1).²²² Moreover, the Chief Prosecutor holds

²²⁰ Article 42(1) of the *Rome Statute* states that the Office of the Prosecutor (OTP): "shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court" (see ICC, 2011b: 27).

²²¹ The position of Chief Prosecutor was previously held by Luis Moreno-Ocampo (2003-2012).

²²² Article 42(2) of the *Rome Statute* depicts that: "the Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof" (see ICC, 2011b: 27). Moreover, it is the Chief Prosecutor who is responsible for representing the OTP externally, most notably during United Nations Security Council (UNSC) briefings and civil society conferences.

broad powers of prosecutorial discretion regarding the actions of the OTP (see Davis, 2015; Twinomugisha, 2010; Schabas, 2008a; Greenwalt, 2007; Jallow, 2005; Brubacher, 2004), so as to ensure that the Office's actions best serve the 'interests of justice' (see Lovat, 2006; Gallavin, 2003).²²³ This means that the OTP, and its Chief Prosecutor who is responsible for sanctioning the final decisions, are integral components of the ICC's operations for three reasons: they select the situations where the ICC will investigate, they choose who the ICC will prosecute, and the Chief Prosecutor determines the manner in which the investigation, and any subsequent prosecutions, will be conducted. As such, the OTP, and its Chief Prosecutor, can be considered two of the most important stakeholders with regards to the ICC's overall performance.

However, during the interviews conducted for this thesis, many respondents expressed concerns regarding the quality of the personnel working in the OTP. For example, a representative from Enough Project stated that: "the Court, particularly the OTP, doesn't have... the high quality lawyering that it needs".²²⁴ Similarly, a British-based barrister, with defence council experience, argued that "they've got really poor people *laughter*, they're dreadful",²²⁵ a sentiment that was echoed by a Hague-based defence lawyer who suggested that "at the moment they don't really have enough good trial attorneys".²²⁶ This alleged poor quality personnel may help explain some of the concerns that have been expressed with regards to the practice of the OTP in general (see Hoile, 2014a: 115-143; FIDH, 2011) and in more specific areas, including being unfairly selective (see Peet, 2015; Tiemessen, 2014;

²²³ Article 53 of the *Rome Statute* makes specific reference to the Chief Prosecutor ensuring that an investigation will "serve the interests of justice" (see ICC, 2011b: 33). The meaning of this phrase was discussed in an eponymous report from the OTP in 2007 (see ICC, 2007a).

²²⁴ Interview with representative from Enough Project, 11 December 2013.

²²⁵ Interview with British-based barrister 2, 25 November 2013.

²²⁶ Interview with Hague-based barrister, 19 February 2014.

Chaulia, 2013), biased against Africans (see Smith, 2012; Reuters, 2011), conducting poor investigations (see Buisman, 2013) and poorly managing cases (see Rosenberg, 2017; Hansberry, 2011). In fact, the practice of the OTP and Chief Prosecutors is considered to have been so bad by Sir Geoffrey Nice QC that he suggested “there is a strong argument that all cases should be reviewed under a new Prosecutor” (see 2012: 9). In light of these observations, this Section will analyse the extent to which the practice of the OTP and its Chief Prosecutors has been conducted in a manner that can be said to be compatible with the theoretical demands of justice outlined in Chapter Three. The Section will be divided into two Sub-Sections: the first will focus on the apparent inconsistency in the OTP’s selection practice; and the second will assess the practice of the Chief Prosecutors and whether they exert the virtues required of the position.

7.2.1 The OTP and Situation Selection: Inconsistent Application and Timeframes

As mentioned in Section 2.2.3, one of the primary criticisms relating to the OTP’s practice, and often the ICC’s search for international criminal justice more broadly, is that it has been unfairly selective with regards to where and who it has investigated (see Peet, 2015; Tiemessen, 2014; Chaulia, 2013). However, unqualified attempts to delegitimise the ICC, or to label it as ineffective or unfair, on the basis that the OTP has been selective is problematic for three reasons. First, as noted by Chris Brown, all forms of intervention possess an element of selectivity, simply because it is not possible to intervene everywhere (see 2003); thus, to single out the ICC for criticism is perhaps unfair.²²⁷ Second, representatives from both the OTP and Registry defended the Office’s actions by highlighting the fact that the OTP’s mandate, to

²²⁷ It should be noted that selectivity criticisms have also been raised with regards to humanitarian intervention (see Szende, 2012; Binder, 2009; Brown, 2003; Kritsiotis, 1998) and aid programmes (see In’airat, 2014; Clist, Isopi and Morrissey, 2012; Dietrich, 2012; OECD, 2003)..

focus on those most responsible for the most severe violations of international criminal law, is *de facto* selective.²²⁸ Finally, as was discussed in Section 3.4.1, notions of justice are by nature selective because they are designed to delineate between competing claims to entitlement or resources.²²⁹ Therefore, this thesis suggests that the question of selectivity within the practice of the OTP should not be framed as if but as how and why? This Sub-Section will argue that the OTP has perhaps been unfairly selective on the basis that its practice has been highly inconsistent (see Ambos and Stegmiller, 2013; Tedeschini, 2015). This alleged inconsistency is problematic because it arguably displays an incompatibility with the notion of justice as consistency, outlined in Section 3.4.2. Moreover, this Sub-Section will argue that the inconsistency of the OTP's practice exists in two independent but interrelated areas: the gravity of the situations selected for full investigation, and the time situations spend at the preliminary examination stage.

With regards to the first area, gravity, this is important because, along with complementarity,²³⁰ it forms a core feature of the ICC's selection policy.²³¹ However, despite Moreno-Ocampo claiming to have "independently selected the gravest situations under our jurisdiction" (see 2008: 4), questions have been, and continue to be, raised regarding the consistency with which gravity thresholds have been applied by the OTP (see Smeulers, Weerdesteijn and Hola, 2015; deGuzman, 2012a; Schabas, 2010a). As mentioned in Sub-Section 6.4, measuring gravity is both difficult and subjective but one way in which it can be done is quantitatively,²³² in terms of the number of deaths and displacements that have

²²⁸ Interview with representative from the ICC's Registry, 20 June 2013. Interview with representative from the OTP, 14 May 2014. See also Section 5.3 for more discussion on the ICC's selective mandate.

²²⁹ In fact, Robert Cryer argued that all criminal justice systems are selective but that instances of selectivity are just more visible with regards to the regime of international criminal justice (see 2005a).

²³⁰ See Sections 5.2 and 6.3.

²³¹ See Sections 5.3 and 6.4.

²³² See Section 6.4 for a discussion on the quantitative and qualitative means for analysing gravity.

occurred with a situation.²³³ For the situations under examination and investigation by the ICC, the number of deaths and displacements are displayed in Table 7.1, and from this a large disparity between the number of deaths and displacements from the situations can be seen, which could be used to suggest an inconsistent application of gravity thresholds.

For example, with regards to those situations under Full Investigation, the number of deaths and displacements from the Central African Republic I (CAR I) situation, 100 and 20,000, is extensively lower than that of the Democratic Republic of Congo (DRC), 2,800,000 and 3,000,000. Similarly, the alleged inconsistent application of gravity thresholds by the OTP is perhaps further affirmed by a comparison between the situations that have proceeded to Full Investigation and those that remain under Preliminary Examination. Here, Table 7.1 shows that the number of deaths and displacements from the CAR I situation is noticeably lower than seven of the situations, Afghanistan, Burundi, Colombia, Iraq, Nigeria, Palestine and Ukraine, which remain under Preliminary Examination. Additionally, and perhaps more controversial, four of the situations under Preliminary Examination - Afghanistan, Colombia, Iraq and Nigeria - have allegedly resulted in more deaths and displacements than 70% of those that are under Full Investigation.

This final observation leads neatly into the second area of perceived inconsistent practice regarding the varying length of time situations spend at the Preliminary Examination stage. Concerns regarding the lengths of Preliminary Examinations were a feature of the interviews conducted for this thesis. For instance, a representative from Human Rights Watch (HRW) argued that: “it is not acceptable... to have a situation under analysis for... a long

²³³ This is not to say that deaths and displacements are the sole quantitative gravity criteria because instances of sexual violence and the use of child soldiers are also important indicators, but accurate and reliable statistics are difficult to find.

Table 7.1 - Table Showing Gravity of Situations under Examination and Investigation by the ICC

Status	Situation	Number of Deaths	Number of Displacements
Full Investigations	Central African Republic I	100	20,000
	Central African Republic II	5,000	980,000
	Côte d'Ivoire	3,000	1,000,000
	Darfur	300,000	2,500,000
	Democratic Republic of Congo	2,800,000	3,000,000
	Georgia	600	127,000
	Kenya	1,000	500,000
	Libya	3,000	300,000
	Mali	2,000	350,000
	Uganda	60,000	400,000
Active Preliminary Examinations	Afghanistan	90,000	3,400,000
	Burundi	500	200,000
	Colombia	200,000	4,700,000
	Comoros	10	Minimal
	Gabon	100	Minimal
	Guinea	150	Minimal
	Iraq	250,000	3,000,000
	Nigeria	20,000	1,000,000
	Palestine	2,000	500,000
	Ukraine	9,000	2,300,000
Completed Preliminary Examinations	Honduras	150	Minimal
	South Korea	60	Minimal
	Venezuela	50	Minimal

(Sourced: ICC, 2016b)

amount of time without a final decision".²³⁴ A representative from REDRESS expanded the concern further suggesting that lengthy, inconsistent Preliminary Examination period was creating the perception that the OTP is unfairly selective:

[there is] a perception issue... There are countries where there are crimes and it does feel like, you know, things are dragging a bit more on these... like Colombia, like Georgia... How many years is good to decide...? Because it doesn't seem to be taking that long for some other countries.²³⁵

²³⁴ Interview with representative from Human Rights Watch (HRW), 17 February 2014.

²³⁵ Interview with representative from REDRESS, 13 September 2013.

Similarly, a representative from the International Bar Association (IBA) stated that the inconsistent Preliminary Examination timeframes were fuelling allegations of an African Bias: “at the same time there have been outstanding Preliminary Examinations for a number of years... that will continue to feed the idea that there is an African Bias at the ICC”.²³⁶ Moreover, these concerns regarding the unnecessary and inconsistent length of Preliminary Examinations has begun to be given academic coverage (see Pues, 2017). In support of these concerns, Table 7.2, displaying the time in months between the start and end of Preliminary Examinations, shows a huge variance between the shortest, Libya, which lasted just one month and the longest, Colombia, which, at the time of writing had been active for 156 months.

However, although the data displayed in Table 7.2 indicates large inconsistencies in the timeframe of Preliminary Examinations, there is a need to contextualise the data and qualify the subsequent inconsistency argument. In short, it is important to note that a degree of temporal variance between Preliminary Examinations was predicted by the OTP’s *Policy Paper on Preliminary Examinations* (see ICC, 2013d: 17-21). The reason for this relates to differences in the burden of proof required by the OTP in relation to the method through which a situation was referred to the Preliminary Examination stage. For instance, whereas under the state or UNSC referral methods a Full Investigation is initiated unless the OTP finds a “reasonable basis” not to proceed (see ICC, 2011b: 33), for the *proprio motu* method of referral the OTP requires judicial verification and must provide evidence demonstrating a “reasonable basis” to proceed (see ICC, 2011b: 33). Thus, because of differences in the procedures for each referral types at the ICC, a degree of inconsistency between the lengths

²³⁶ Interview with representative from International Bar Association (IBA), 26 May 2014.

Table 7.2 - Table Showing Length of Preliminary Examinations by the ICC²³⁷

Status	Situation	Date Preliminary Examination Opened	Date Preliminary Examination Closed	Time Lapsed (In Months)
Full Investigation	Central African Republic I	December 2004	May 2007	29
	Central African Republic II	May 2014	September 2014	4
	Côte d'Ivoire	April 2003	October 2011	102 (12)
	Darfur	March 2005	June 2005	3
	Democratic Republic of Congo	April 2004	June 2004	2
	Georgia	August 2008	January 2016	89
	Kenya	February 2008	March 2010	25
	Libya	February 2011	March 2011	1
	Mali	July 2012	January 2013	6
	Uganda	January 2004	July 2004	6
Active Preliminary Examination	Afghanistan	January 2007	Ongoing	127
	Burundi	April 2016	Ongoing	16
	Colombia	June 2004	Ongoing	156
	Comoros	May 2013	Ongoing	51
	Gabon	September 2016	Ongoing	11
	Guinea	October 2009	Ongoing	94
	Iraq	April 2003	February 2006	34
		May 2014	Ongoing	39
	Nigeria	November 2010	Ongoing	81
	Palestine	January 2015	Ongoing	31
	Ukraine	April 2014	Ongoing	40
Completed Preliminary Examination	Honduras	November 2010	October 2015	59
	South Korea	December 2010	June 2014	42
	Venezuela	January 2003	February 2006	37

(Sourced: ICC, 2016b)

of Preliminary Examinations, based on their referral types, is to be expected. Nevertheless, in the interests of the notions of justice as consistency, outlined in Section 3.4.2, those situations with the same context, in this case the same referral type, should have Preliminary Examinations that exert a degree of consistency to one another, something which has perhaps not occurred.

Supporting this claim, Table 7.2 shows some noticeable disparities between the lengths of Preliminary Examinations for the same type of referral. For example, with regards

²³⁷ Data correct as of August 2017.

to the self-referrals, the Central African Republic I (CAR I) and Gabon²³⁸ situations are clear outliers insofar as they spent, or have currently spent, 29 and 11 months under Preliminary Examination, whereas, the other four self-referrals, CAR II, the Democratic Republic of Congo (DRC), Mali and Uganda, spent 4, 2, 6 and 6 months respectively. Here, it can be seen that the Preliminary Examination for CAR I lasted almost two years longer than the others and the one for the Gabon situation is nearly 6 months longer already. In fact, the CAR I Preliminary Examination was so much longer than the DRC and Uganda ones, the only two that had been conducted at the time, that on 30 November 2006 Pre-Trial Chamber III (PTC III) requested the OTP to provide clarification as to why it was lasting so much longer than those for the DRC and Uganda (see ICC, 2006i); a reality which perhaps serves to affirm concerns regarding the inconsistent timeframes of Preliminary Examinations.

However, where the biggest variances exist is within the *proprio motu* referral Preliminary Examinations. For instance, with regards to the completed Preliminary Examinations that arose as a result of *proprio motu* referrals, Table 7.2 shows large amounts of inconsistencies with the timescale of Preliminary Examinations ranging from 12²³⁹ and 24 months for the Côte d'Ivoire and Kenya situations, respectively, to 59 and 89 months for those in Honduras and Georgia with no explanation from the OTP for this disparity. Similarly, but perhaps more concerning, is the length of time some of the ongoing Preliminary Examinations have been active, with very little information provided as to progress being made. From Table 7.2, it can be seen that the most concerning situations would be Afghanistan, Colombia and

²³⁸ Data for the Gabon situation is correct as of August 2017 when the Preliminary Examination was still ongoing.

²³⁹ Table 7.2 shows two figures: 12 and 102. The Preliminary Examination of the Ivorian situation had been active for 102 months but it is important to note that the current investigations concern allegations of crimes committed in the aftermath of the 2010 Presidential Election held between October and November of that year. As such, this would indicate that the Preliminary Examination of this violence lasted only 12 months.

Guinea which, at the time of writing, have been under Preliminary Examination for 127, 156 and 94 months respectively. To contextualise this data further, when compared to the Georgian situation, by far the longest Preliminary Examination transferred to Full Investigation from a *proprio motu* referral, the Afghan situation has spent over three years longer under Preliminary Examination, the Colombian situation over five years and the Guinean situation five months. Moreover, when compared to the Ivorian situation, the shortest Preliminary Examination transferred to Full Investigation from a *proprio motu* referral, the Afghan situation has spent over nine years longer under Preliminary Examination, the Colombian situation 12 years and the Guinean situation 6 years. Thus, from these figures it can be suggested that there has been very little consistency between the timeframes for Preliminary Examinations of those situations that have emerged as a result of the Chief Prosecutor's *proprio motu* powers of referral.

In short, the large temporal variance in the length of Preliminary Examinations could be used to highlight the OTP's inconsistent practice. Now, this inconsistency can be considered a problem in itself with regards to compatibility with justice because, if it occurs in relation to situations that are comparable in context, it can be said to violate the notion of justice as consistency discussed in Section 3.4.2. In other words, it can be argued that the inconsistent length of Preliminary Examinations of the same referral type can be considered incompatible with the notion of justice as consistency because situations with contextual similarities are being treated differently. However, this inconsistency, aside from being viewed as problematic in itself, can be used to draw some broader conclusions which challenge the compatibility of the OTP's practice with three other demands of justice.

First, it is debatable whether inconsistent Preliminary Examinations can be said to be compatible with the demand, outlined in Sections 3.1.1 and 3.2.1, that justice provide mutual benefits for all, particularly the weakest and most vulnerable within a transaction. Here, the weakest and most vulnerable are considered to be the victims and communities affected by international crimes, and it is possible that through the practice of extending the time a situation spends under Preliminary Examination, the OTP is denying these stakeholders access to justice and redress mechanisms; thus, not providing them any benefit. Instead, looking at the identity of those situations that have been under Preliminary Examination for a long time, some of them, namely Afghanistan, Colombia, Nigeria and Iraq, pertain to situations where strong political actors are either directly involved or have vested interests. This means that it is possible that the OTP is serving its own interests by not becoming embroiled in complex political situations and instead opting for easier targets in the form of politically weak states. This concern was expressed by the aforementioned British-based barrister who argued that: “there is also a feeling that they [the OTP] bottled it as regards things like British involvement in the Iraq War... Instead, they focussed on weak cases in black Africa”.²⁴⁰ Likewise, the abovementioned Hague-based barrister accused the OTP of going after “easy targets” of political “insignificance”.²⁴¹ As such, it can be argued that the OTP’s practice of delaying Preliminary Examinations seemingly indefinitely, for some situations, is incompatible with the demand that justice provides mutual benefits for all, most notably the weakest and most vulnerable, discussed in Sections 3.1.1 and 3.2.1. This is because it appears that the OTP is serving its own interests by avoiding becoming entangled in politically charged situations

²⁴⁰ Interview with British-based barrister 2, 25 November 2013.

²⁴¹ Interview with Hague-based barrister, 19 February 2014.

which is not serving the interests of victims and affected communities insofar as they are being denied access to justice.

Second, the aforementioned suggestion that the OTP has focussed on situations in, or involving, politically weak states poses a question with regards to the compatibility of the OTP's practice with the demands of justice as impartiality, outlined in Section 3.4.3. Impartiality demands that factors, such as bias, favouritism and prejudice, be removed from consideration in decision-making. Furthermore, the importance of impartiality was alluded to by a representative from the OTP interviewed for this thesis: "we [the OTP] need to demonstrate that our decisions are based upon some form of objective criteria, or at least are objectively justifiable".²⁴² However, looking at the disparity in timeframe between African situations transferred to Full Investigations, such as Côte d'Ivoire and Kenya, and those outside of Africa, such as Afghanistan, Colombia, Georgia and Iraq, which could be said to concern or involve more powerful states, suggests that there are some form of geopolitical considerations influencing the OTP's decision-making. For example, a representative from the American Non-Governmental Coalition for the International Criminal Court (AMICC) interviewed for this thesis argued that the OTP has perhaps given the "Colombians too much leeway" in comparison to other situations.²⁴³ Moreover, an international legal practitioner, with experience in the administration of international criminal law, suggested that the OTP, somewhat problematically given its gravity defined mandate discussed in Section 5.3, "do consider... the level of success as to whether or not... they believe they can actually achieve this case".²⁴⁴

²⁴² Interview with representative from the Office of the Prosecutor (OTP), 14 May 2014.

²⁴³ Interview with representative from American Non-Governmental Organization Coalition for the International Criminal Court (AMICC), 16 September 2013.

²⁴⁴ Interview with an international legal practitioner, 12 September 2013.

Now, it should be noted, as was in Section 3.4.3, that identifying and measuring impartial justifications is difficult and subjective. But, it could be argued that by seemingly treating certain situations differently on the basis of their political significance is tantamount to allowing notions of favouritism to influence its decision-making. Furthermore, it is possible that by considering the prospect of success the OTP is not selecting cases impartially in accordance with the gravity criteria identified as central to the OTP's mandate in Sections 5.3 and 6.4. In sum, it can be argued that the OTP's practice of leaving certain situations under indefinite Preliminary Examination is incompatible with the demands of justice as impartiality because many of the situations with extended Preliminary Examinations are being given preferential treatment, or at least being treated differently, on the basis that they are politically stronger, Colombia and Nigeria, concern the actions of more powerful states, Afghanistan and Iraq,²⁴⁵ or are potentially difficult to investigate and prosecute.

7.2.2 The Chief Prosecutor(s) and the Conduct of Investigations

The position of Chief Prosecutor has been identified as one of the most important within the ICC (see Kaye, 2011; Hall, 2004), not least because of their discretionary powers outlined above. However, there have been suggestions and examples, some of which will be detailed below, that could indicate that some of the practices of the two holders of this position, Luis Moreno-Ocampo and Fatou Bensouda, have been incompatible with some of the theoretical demands of justice outlined in Chapter Three.

As outlined in Section 2.2.1, there is a plethora of literature criticising the practice and personality of Moreno-Ocampo. Interestingly, some of the respondents interviewed for this thesis reiterated the negative feeling portrayed by the literature, describing Moreno-Ocampo

²⁴⁵ It is likely that the Ukrainian situation will also emerge as one of these extended Preliminary Examinations.

as “abrasive”,²⁴⁶ “controversial”,²⁴⁷ an “incompetent prosecutor”,²⁴⁸ and even “useless”.²⁴⁹ Now, although this thesis acknowledges the difficulty of Moreno-Ocampo’s task as first Chief Prosecutor, it does agree that some of his actions can be considered problematic with regards to their compatibility with elements of this thesis’ framework of justice. One example of problematic practice by Moreno-Ocampo is his public announcement of the Ugandan investigation on 29 January 2004, one of his first official appearances as ICC Chief Prosecutor. Now, on face value a public announcement of a major ICC development is neither controversial nor surprising, but the fact that Moreno-Ocampo decided to make the announcement alongside Ugandan President, Yoweri Museveni (see ICC, 2004a), potentially is. Moreno-Ocampo defended his action in instrumental terms, arguing that it was necessary to secure the required “future cooperation between Uganda and the International Criminal Court” (see ICC, 2004a). However, for this thesis, Moreno-Ocampo’s decision to appear alongside Museveni is problematic because it can be considered incompatible with the demands of justice as individual virtue, outlined in Section 3.4.5.

One such virtue is independence, which Article 42(5) of the *Rome Statute* (see ICC, 2011b: 28) and Regulation 13 of the *Regulations of the Office of the Prosecutor* (see ICC, 2009b: 12) list as an essential characteristic to be shown by the ICC’s Chief Prosecutor. However, it is debatable whether Moreno-Ocampo can be said to have purported the virtue of independence because his appearance alongside the Ugandan President possibly creates the impression that the OTP’s investigation was tied to, or even sponsored by, the Ugandan government. In addition to independence, another important virtue for the Chief Prosecutor,

²⁴⁶ Interview with an international legal practitioner, 12 September 2013.

²⁴⁷ Interview with representative from the Office of the Prosecutor (OTP), 14 May 2014.

²⁴⁸ Interview with Hague-based barrister, 19 February 2014.

²⁴⁹ Interview with British-based barrister 2, 25 November 2013.

as outlined in Article 42(7) of the *Rome Statute* (see ICC, 2011b: 28), is impartiality. Moreover, as detailed in Section 3.4.4, impartiality is actually a demand of justice in itself, detailing that decisions should not be influenced by arbitrary considerations, such as bias, favouritism or prejudice. But, Moreno-Ocampo's decision to appear alongside Museveni could be interpreted as a lack of impartiality because it could create the perception that the Ugandan government, in return for their cooperation, could be treated favourably and thus the investigation may be perceived to be biased or prejudiced against the Lord's Resistance Army (LRA). In sum, it can be argued that Moreno-Ocampo's decision to appear on a podium alongside the Ugandan President when announcing the opening of the Ugandan investigation, is incompatible with the demand of justice as individual virtue because it created a perception issue relating to the independence and impartiality of the OTP's investigation.

In contrast to Moreno-Ocampo, the incumbent ICC Chief Prosecutor, Fatou Bensouda, has been subjected to much less criticism.²⁵⁰ In fact, the change of leadership came with the hope that the work and image of the ICC would improve under Bensouda (see Hirsch, 2012; Kersten, 2012; Lowe, 2011) because of, as outlined by an international legal practitioner interviewed for this thesis, the different leadership styles and approaches of Bensouda and Moreno-Ocampo.²⁵¹ However, as with Moreno-Ocampo, some of Bensouda's actions have been problematic with regards to their compatibility with elements of this thesis' framework of justice. A possible example of Bensouda's poor practice can be seen by the fact that much of her tenure has been marred by an ongoing dispute with Côte d'Ivoire over the surrender of former First Lady Simone Gbagbo. The Ivorian government have surrendered jurisdiction on the cases against former President Laurent Gbagbo and Charles Blé Goudé but Simone

²⁵⁰ In some cases, reviews of Fatou Bensouda's performance have been favourable (see Addley, 2016).

²⁵¹ Interview with an international legal practitioner, 12 September 2013.

Gbagbo remained in domestic custody and was prosecuted her for crimes that took place the 2011 Ivorian Civil War, although she was acquitted in March 2017 (see BBC News, 2017).

Now, in accordance with the ideas outlined in Section 6.3.2 on the principle of complementarity, regardless of whether the outcome of the trial is agreed with, the ability and willingness of Ivorian authorities to prosecute Gbagbo should be enough for the OTP to agree to surrender jurisdiction over the case. In the context of this discussion, this thesis would place some of the blame here onto Bensouda who perhaps should have used her prosecutorial discretion powers to cancel ICC proceedings on the basis that Gbagbo was already being prosecuted by domestic authorities, surely a clear example of complementarity in action. Thus, building on this observation, it could be argued that Bensouda's practice has been incompatible with the demands of justice as individual virtue, outlined in Section 3.4.5, because, by refusing to surrender jurisdiction to Ivorian authorities despite their apparent willingness and ability to prosecute, she has arguably not shown the levels of discretion desirable for the Chief Prosecutor.

In sum, from the above discussions, relating to the practices of Moreno-Ocampo and Bensouda, a general conclusion can be drawn: that sometimes the ICC's two Chief Prosecutors failed to display the virtues expected of individuals holding their role. This is important for this thesis for two reasons. First, at a very basic level, not displaying the required virtues can be considered incompatible with the demands of the notion of justice as individual virtue outlined in Section 3.4.5. Second, it can perhaps be argued that some of the opposition to the OTP's practice may have emerged as a result of opposition to the individuals in decision-making positions rather than the decisions themselves. Perhaps the clearest example of this argument can be drawn from the following statement from former African Union (AU)

Chairperson Jean Ping: “frankly speaking, we are not against the ICC. What we are against is Ocampo’s justice, the justice of one man” (as cited in BBC News, 2011). This observation is interesting because it appears to support the argument made in Section 3.4.6 regarding the mutual dependency that exists between notions of justice as outcome and justice as individual virtue, an argument grounded on the basis that the latter provides the former with credibility and legitimacy. In other words, if the ICC’s Chief Prosecutors fail to display the virtues expected of an individual that holds the position then the outcomes produced by their decisions may always struggle to find the broad and necessary levels of societal acceptance.

7.2.3 Summary

To summarise, this Section has argued that the variable length of Preliminary Examinations stemming from the OTP’s inconsistent practice, as well as the lack of certain desirable virtues held by the ICC’s two Chief Prosecutors, can be considered to be incompatible with five elements of this thesis’ theoretical framework of justice outlined in Chapter Three: justice as consistency (Section 3.4.2); serving the interests of the weakest and most vulnerable (Sections 3.1.1 and 3.2.1); justice as impartiality (Section 3.4.3); justice as individual virtue (Section 3.4.5); and the mutual dependency of notions of justice as process, outcome and virtue (Section 3.4.6). This is an important observation for this thesis because it affirms the main argument that, for the most part, it is stakeholder practice, not the ICC’s purposes and procedures, which have been incompatible with the theoretical demands of justice. Having considered the practices of the OTP and Chief Prosecutors, this Chapter now turns its attention to that of the states parties.

7.3 The Practice of the States Parties to the *Rome Statute*

The states parties to the ICC interact with the Court in two ways: collectively, in the form of the Assembly of States Parties (ASP), and individually. Moreover, as outlined in Section 6.5, when a state ratifies the *Rome Statute* it not only signals an acceptance of the ICC's jurisdiction but it also establishes a legal obligation to comply with the Court's decisions and requests and provide the Court with the assistance and support it needs to function effectively. The basis of this legal obligation is the principle of *pacta sunt servanda*, enshrined in Article 26 of the *Vienna Convention on the Law of Treaties* (see UN, 1969: 11), which denotes the binding nature of treaties and conventions as well as requiring all states parties to act in a manner that does not defeat the purpose of the agreement. Furthermore, adhering to the legal obligation to comply and cooperate with the ICC is important because only by fulfilling this responsibility can states parties be said to have acted in a manner compatible with the notion of legal justice outlined in Section 3.4.4.

However, despite the existence of this legal obligation to comply and cooperate, the extent to which states parties have upheld this responsibility is the subject of much debate. On the one hand, Rita Mutyaba argued that the fact that the ICC is operational, in terms of conducting successful investigations and prosecutions, perhaps indicates that a degree of state party compliance and cooperation has taken place (see 2012). On the other hand, other commentators have been less optimistic and positive in relation to the extent to which state party compliance and cooperation has been forthcoming or to the required levels (see Jones, 2016; Barnes, 2011; Phooko, 2011). A possible explanation for these contrasting opinions is the multi-faceted nature of the ICC's cooperation regime, as outlined in Section 6.5. This multi-dimensional way in which compliance and cooperation with the ICC can exist perhaps means that non-compliance/cooperation is not a blanket case but is more likely isolated to

one or two issues and/or cases. Nonetheless, although state party compliance/cooperation has been forthcoming in some areas, it is still possible to argue that many of the biggest challenges facing the ICC relate directly to issues brought about by insufficient, or even non-existent, levels of state party non-compliance/cooperation.

In the context of the challenges posed by the ICC's reliance on state party compliance/cooperation, Hannah Woolaver and Emma Palmer argued that states parties, whether individually or collectively as the ASP, influence the Court in three ways: by altering the ICC's rules of operation; by choosing whether or not to comply/cooperate with the Court's decisions and requests; and through the adoption of the budget (see 2017). However, because this Section's focus is on potential issues relating to the compatibility of the practice of the ICC's states parties with theoretical demands of justice, two of these challenges are perhaps most prominent, both of which were outlined by a representative from the American Non-Governmental Coalition for the International Criminal Court (AMICC) interviewed for this thesis:

the Court faces two challenges, not entirely of its own making. One of them is the question of the budget, whether it will get adequate money to carry out its functions. And the other one is whether it will get... adequate enforcement and cooperation from... member states in carrying out its arrest warrants.²⁵²

Furthermore, as will be outlined below, concerns regarding the practice of states parties in the areas of compliance with arrest and surrender requests and the provision of the budget were a prominent feature of the interviews conducted for this thesis. In light of these

²⁵² Interview with representative from American Non-Governmental Organization Coalition for the International Criminal Court (AMICC), 16 September 2013.

observations, the remainder of this Section will use these concerns as case studies through which to analyse the compatibility of state party practice with the theoretical demands of justice.

7.3.1 States Parties and the ICC Budget: Limited Resource Cooperation

In interviews for this thesis, a representative from the ICC's Registry claimed that "right now we are facing... difficulties with states over the budget"²⁵³ and a representative from Enough Project argued that "the Court could be doing so much better... But, you know... the staffing and resources just isn't there".²⁵⁴ These responses affirm the somewhat obvious observation that the ICC's budget is a source of much debate and disagreement between the Court and its member states; after all nearly all international organisations suffer resource limitations (see Patz and Goetz, 2015; Ingadottir, 2011; Taylor, 1991). Issues relating to the states parties practice concerning the budget are important for three reasons: first, Article 115(a) of the *Rome Statute* identifies states parties as the primary source of funding for the ICC (see ICC, 2011b: 71); second, as noted in Section 6.5, it can be argued that states parties are under a legal obligation to provide the ICC with the necessary levels of, what this thesis called, resource cooperation; and lastly, it has been suggested that the practice of states parties has perhaps placed financial strictures onto the ICC. However, because providing an objective criterion upon which to judge the budget is almost impossible²⁵⁵ and the fact that

²⁵³ Interview with representative from ICC's Registry, 20 June 2013.

²⁵⁴ Interview with representative from Enough Project, 11 December 2013. Likewise, Amnesty International's Jonathan O'Donohue (2005; 2004) and Human Rights Watch's (HRW's) Elizabeth Evenson (2015) have criticised the ICC's budget levels. Although ironically, the ICC's critics have suggested that given the Court's budget is far too high, given its alleged inefficiency and questionable performance (see Hoile, 2015; Davenport, 2014; BBC News, 2012b).

²⁵⁵ Marieke Wierda and Anthony Triola did analyse the ICC's budget in comparison with that of the ICTY and ICTR (see 2012). However, this is perhaps not a good means for judging if the ICC's budget has been too high or low because the *ad hoc* tribunals have a different mandate to the ICC and are funded from the UN's budget rather than individual, voluntary state contributions.

international trials are often more complex and thus more expensive than domestic trials (see Wippman, 2006), this thesis considers the practice of states parties causing financial strictures for the ICC to be of most importance.

The interviews conducted for this thesis raised two issues in relation to the practice of states parties vis-à-vis the budget. The first pertains to the budget adoption practice of the ASP, whereby the ASP scrutinises every single expenditure proposed by the ICC and often adopt a budget smaller than the one requested by the Court.²⁵⁶ The second relates to the budget provision practice of certain individual states parties inasmuch as some have been unwilling to pay the contributions they agreed at the annual conference.²⁵⁷ Now, for issues of space the evidence supporting these two observations is included in Appendix E. In short, the evidence in Appendix E affirms these two arguments and can be used to support the broader claim that the budget adoption and provision practice of states parties, as part of the ASP and individually respectively, has perhaps been inadequate and forced the ICC to operate in financial hardship. However, as a caveat, it was noted in interviews that the ICC also holds a responsibility to prove that it is best using the resources available to it in order to earn the trust of the states parties so they are willing to provide it with more resources.²⁵⁸ Nevertheless, the actions of the ASP and individual states parties, in relation to budget adoption and provision respectively, remain issues in their own right.

This is because, the broad argument outlined above and evidenced in Appendix E, that the practice of states parties, through the ASP and individually, has placed financial strictures

²⁵⁶ Interview with Tiina Intelmann, former President of the Assembly of States Parties, 16 September 2013. Interview with representative from REDRESS, 13 September 2013. Interview with representative from ICC's Registry, 20 June 2013.

²⁵⁷ Interview with British-based barrister 1, 25 June 2013. See also, Sophie van Leeuwen (2015).

²⁵⁸ Interview with representative from REDRESS, 13 September 2013. Interview with Fadi El Abdallah, ICC Spokesperson, 20 August 2013.

onto the ICC, is important for this thesis' discussion on justice for two reasons. First, it poses a question as to whose interests the actions are promoting. In Sections 3.1.1 and 3.2.1, it was noted that a core feature of a liberal, egalitarian conception of justice is that it aims to remove the influence of factors of political self-interest from the decision-making process, so that mutually beneficial outcomes are produced; particularly for the weakest and most vulnerable within a transaction. However, in this context, it is debatable whether the budget adoption practice of the ASP can be said to be reflective of actions intended to serve the weak and vulnerable, in this sense identified as the victims and communities affected by international crimes, because the practice described above can be said to be placing financial strictures onto the ICC which could, in turn, be hindering its ability to function efficiently. Instead, it is plausible that these actions actually serve the interests of states parties who are able to limit their financial outgoings, and improve their own economic situation, by negating to fulfil their contributions to the ICC. As such, it could be argued that the budget adoption practice of the ASP has been incompatible with the theoretical demand that a just decision is one that serves the interests of the weakest or most vulnerable. Second, the practice of certain states parties failing or even refusing to pay their agreed contributions could be considered an unjust action. As outlined in Section 3.4.4, notions of legal justice define an action as just when it complies with the law. In this context, as noted above, states parties are legally obliged to provide their agreed contributions, which means that any state party that does not provide the ICC with the contributions they have agreed to is not upholding their legal obligations to the Court. Thus, it can be argued that failing or refusing to make the financial contributions promised to the ICC is incompatible with the theoretical demands of legal justice because it is defaulting on a legal agreement.

7.3.2 States Parties and the Arrest and Surrender of ICC Suspects: Inconsistent Physical Cooperation

As mentioned in Section 6.5, the ICC does not possess a police force and as such the Court's ability to put suspects on trial is solely reliant on states complying with arrest and surrender requests. Of particular importance here is state party compliance, because these states are under a legal obligation to comply with the ICC's requests and thus, if they are non-compliant, then they could be said to have acted unjustly.²⁵⁹ Moreover, it is also important to note that for the purpose of this analysis the actions of both Sudan and Libya are analysed as if they were states parties because this thesis agrees with the arguments of Dapo Akande (see 2009: 340-342) and Sarah Williams and Lena Sherif (2009: 84-85) that UNSC Resolution 1593, and subsequently 1970,²⁶⁰ delegates the *Rome Statute's* compliance and cooperation responsibilities onto the Sudanese and Libyan government as if they were states parties. However, the extent to which states parties have upheld their obligation to comply with the ICC's arrest and surrender requests was a contested topic in the interviews conducted for this thesis. For instance, on the one hand, a representative from the Coalition for the International Criminal Court (CICC) argued that: "cooperation has not been forthcoming, especially as relates to the enforcement of arrest warrants".²⁶¹ Whereas, on the other hand, a representative from No Peace Without Justice (NPWJ) suggested that: "most... states parties have been fairly willing to cooperate with the Court. They have provided... the kind of cooperation foreseen in the Statute... most obviously actioning arrest warrants".²⁶²

²⁵⁹ See Section 3.4.4.

²⁶⁰ Dapo Akande (see 2009) and Sarah Williams and Lena Sherif (see 2009) were writing in the context of the Darfur situation but the same principles apply to the Libyan situation.

²⁶¹ Interview with representative from the Coalition for the International Criminal Court (CICC), 21 May 2014. See also, the discussion on how the term cooperation is often, perhaps incorrectly, used to refer to factors pertaining to compliance.

²⁶² Interview with representative from No Peace Without Justice (NPWJ), 4 September 2013.

Now, the figures relating to outstanding ICC arrest warrants appear to support the claims of the representative from NPWJ. Of the 41 individuals indicted by the ICC only 28, for a variety of reasons, were required to be arrested and surrendered to the Court (see ICC, 2017a).²⁶³ At the time of writing, exactly half of these 28 individuals had either been detained and transferred to the ICC's jurisdiction, or, in the case of Bosco Ntaganda, had voluntarily surrendered themselves to the Court albeit via the US embassy in Kigali, Rwanda.²⁶⁴ The identities of the individuals covered by the remaining 15 outstanding arrest warrants are detailed in Table 7.3, and as can be seen three of the individuals are being held in domestic custody but the other 12 are fugitives, inasmuch as they are not knowingly detained. Thus, because only half of the arrest warrants issued by the ICC remain outstanding it is possible that the issue of state party compliance is much narrower and more nuanced than the blanket non-compliance suggested above by the representative from CICC. Instead, as argued by a representative from the International Bar Association (IBA) interviewed for this thesis, perhaps the primary issue pertaining to state party compliance with ICC arrest and surrender requests is that it has been "selective" insofar as "states decide when and if they will cooperate with the Court".²⁶⁵ Furthermore, in order to better be able to identify this apparent selective compliance from states parties, it is important to consider the idea of involuntary and voluntary non-compliance outlined in Section 6.5. By applying this involuntary/voluntary non-compliance dichotomy to the aforementioned 15 concerning outstanding arrest warrants, those that directly relate to problematic state party practice can be highlighted.

²⁶³ Some individuals chose to appear voluntarily. A detailed overview of the suspects indicted by the ICC can be found in Appendix E.

²⁶⁴ In addition to Bosco Ntaganda's voluntary surrender, the other 13 arrests were enacted by states parties to the ICC: four by the DRC, two by Belgium, Côte d'Ivoire and France, and one by CAR, Netherlands and Niger.

²⁶⁵ Interview with representative from International Bar Association (IBA), 26 May 2014.

Table 7.3 - Table Showing the Details of the Outstanding ICC Arrest Warrants Per Situation²⁶⁶

Situation	Individual	Date of Arrest Warrant	Status	Form of Non-Compliance
Democratic Republic of Congo	Sylvestre Muducumura	13 July 2012	Fugitive	Involuntary
Uganda	Joseph Kony	8 July 2005	Fugitive	Involuntary
	Vincent Otti	8 July 2005	Fugitive	Involuntary
Darfur	Ahmad Muhammad Harun	27 April 2007	Fugitive	Voluntary
	Ali Muhammad Ali Abd-al-Rahman	27 April 2007	Fugitive	Voluntary
	Omar Hassan Ahmad al-Bashir	4 March 2009 12 July 2010	Fugitive	Voluntary
	Abdel Raheem Muhammad Hussein	1 March 2012	Fugitive	Voluntary
	Abdallah Banda Abakaer Nourain	11 September 2014	Fugitive	Voluntary
Kenya	Walter Osapiri Barasa	2 August 2013	Fugitive	Voluntary
	Paul Gicheru	10 March 2015	Domestic custody	Voluntary
	Philip Kipkoech Bett	10 March 2015	Domestic custody	Voluntary
Libya	Saif al-Islam Gaddafi	27 June 2011	Fugitive	Involuntary
	Al-Tuhamy Mohamed Khaled	24 April 2017	Fugitive	Involuntary
	Mahmoud Mustafa Busayf Al-Werfalli	15 August 2017	Fugitive	Involuntary
Côte d'Ivoire	Simone Gbagbo	29 February 2012	Domestic custody	Involuntary

(Sourced: ICC, 2017a)

Of the 15 outstanding arrest warrants detailed in Table 7.3, this thesis would argue that five of them, Sylvestre Muducumura, Joseph Kony, Vincent Otti, Saif al-Islam Gaddafi, Al-Tuhamy Mohamed Khaled and Mahmoud al-Werfalli, can be considered examples of involuntary non-compliance. This is because it can be argued that although the situation states in question, DRC, Uganda and Libya, are aware of their obligation to arrest and surrender these suspects, the governments of these states either do not possess the ability to apprehend these suspects or are not aware of their whereabouts. Moreover, of the three suspects being held in domestic custody within the situation states, Paul Gicheru, Philip

²⁶⁶ The situations not included, Central African Republic I (CAR I), Mali, CAR II and Georgia, do not have any warrants outstanding connected to them. Data correct as of August 2017.

Kipkoech Bett and Simone Gbagbo, only Gicheru and Bett will be considered as problematic voluntary non-compliance by this thesis. This is because, although the Gbagbo situation is a theoretical example of voluntary non-compliance inasmuch as Ivorian authorities have her in custody and are still purposefully choosing not to surrender her to the ICC, this thesis, in Section 6.3, advocated that complementarity be primarily measured in accordance with outcomes, namely the ability to conduct the prosecution of indicted individuals, and thus would argue that the Gbagbo case should have been surrendered to Ivorian jurisdiction on the basis that they are both able and willing to conduct a domestic prosecution.²⁶⁷ Therefore, of the 14 outstanding arrest warrants detailed in Table 7.3, this thesis would argue that only eight of them, those against Ahmed Muhammad Haroun, Ali Muhammad Ali Abd-al-Rahman, Omar Hassan Ahmad al-Bashir, Abdel Raheem Muhammad Hussein, Abdallah Banda Abakaer Nourain, Walter Osapiri Barasa, Paul Gicheru and Philip Kipkoech Bett, pertaining to just two situations, Darfur and Kenya, constitute concerning acts of voluntary non-compliance by states parties.

From these seven, six of the alleged instances of voluntary non-compliance concern only the actions of the situation states of Sudan and Kenya. Now, as will be argued below, the possible reasons behind this non-compliant practice remains problematic insofar as it can be considered incompatible with certain demands of justice, but it is important to note that it is perhaps not surprising. This is because it is perhaps unrealistic to expect the Sudanese government to comply with the ICC's arrest and surrender requests given that those individuals indicted are either senior officials in said government or at least have close ties with the Sudanese administration. Similarly, it is unlikely that the current Kenyan

²⁶⁷ Issues pertaining to the Bensouda's handling of the Simone Gbagbo case were outlined in Section 7.2.2.

administration will ever comply with any future ICC arrest and surrender requests because, as Mark Kersten argued, protecting Kenyan citizens from ICC prosecution “allows Kenya to protect its side of the story” of events (see 2016). As such, it can be argued that the main case of concern, with regards to the alleged instances of voluntary non-compliance, is that pertaining to Sudanese President Omar al-Bashir, primarily because this case has involved non-compliance from other ICC states parties not only the situation state.

In fact, the controversy and importance of this case is perhaps affirmed by the attention that it was given by a number of respondents interviewed for this thesis. For example, many respondents echoed the observations of the representative from NPWJ who, in qualification of their earlier statement, argued that although cooperation has been forthcoming in general “there have been some challenges... most obviously in the case of President al-Bashir”.²⁶⁸ The basis of what this thesis will term the ICC’s al-Bashir controversy, is that the Sudanese President is yet to be arrested despite having two arrest warrants against him (see ICC, 2009c; 2010c), for a combined total of over 3070 days, and travelling to 22 states, including eight ICC states parties on 15 separate occasions (see Bashir-Watch, 2016).²⁶⁹

At the heart of the al-Bashir controversy are disputes over the relationship between Articles 27 and 98 of the *Rome Statute*, the sovereign immunity waivers, in relation to cases involving sitting heads of state from a non-ICC member (see Kiyani, 2013; Akande, 2009; 2004; Gaeta, 2009; Nouwen and Albanese, 2009; Williams and Sherif, 2009). This is an important consideration because an analysts’ position on this subject will have a large bearing on how

²⁶⁸ Interview with representative from No Peace Without Justice (NPWJ), 4 September 2013.

²⁶⁹ The eight ICC states parties to have housed Omar al-Bashir since the issuance of his arrest warrant were: Chad in July 2010, August 2011, February and May 2013, and March 2014; the DRC in February 2014; Djibouti in May 2011 and May 2016; Kenya in August 2010; Malawi in October 2011; Nigeria in July 2013; South Africa in June 2015; and Uganda in May 2016.

concerning they view the decision of the 22 states, including the eight ICC members, not to arrest al-Bashir. As alluded to above, this thesis would argue that UNSC Resolution 1593 binds the provisions of the *Rome Statute*, including the sovereign immunity waivers, to individuals from the Sudan as if it were a state party to the ICC (see Akande, 2009: 340-342; Williams and Sherif, 2009: 84-85). Therefore, this thesis argues that al-Bashir's head of state immunity is waived and thus a legal obligation to comply with the ICC's arrest warrant does exist, although importantly the legal obligation only extends to the Sudan²⁷⁰ and ICC states parties (see Akande, 2009: 340-342; Williams and Sherif, 2009: 84-88). This means that third party states remain bound by the principles of sovereign immunity, as depicted under customary international law, because UNSC Resolution 1593 does not specifically bind them to the *Rome Statute* in the same way it does the situation state of Sudan (see Nouwen and Albanese, 2009; Williams and Sherif, 2009: 88-89). In short, this means that of the 22 states to have housed al-Bashir since the issuance of the ICC's arrest warrant, only the actions of the eight states parties, and the Sudan, are of concern because they were the only states legally obliged to comply with the Court's arrest and surrender request.

Moreover, the actions of these eight states parties become more concerning when it is noted that only the practice of Nigeria can be considered to have been an act of involuntary non-compliance. This is because the Nigerian government were able to demonstrate that they were not privy to the African Union's (AU's) invitation list for the summit and once they were aware of al-Bashir's presence on their territory they made a concerted effort to detain him, evidenced by al-Bashir's hasty exit from Nigeria (see ICC, 2013f: 5-6). In contrast, the practice

²⁷⁰ This obligation is merely theoretical as it is unrealistic to expect the Sudanese authorities to detain their head of state and surrender him to the ICC; not least because Sudan's 2005 Constitution awards him *de facto* immunity from all legal proceedings (see Kiyani, 2013: 472; Dworkin and Iliopoulos, 2009).

of the other seven states parties can be considered to have been voluntary non-compliance for one of two reasons: first, al-Bashir was formally invited by the non-compliant state party and thus there was no intention of complying with their international legal obligations to arrest and surrender, as was the case for Kenya (see ICC, 2010d: 3), Djibouti (see ICC, 2016e: 3; 2011e: 3), Chad (see ICC, 2011f: 3) and Uganda (see ICC, 2016f: 4); or second, although not formally invited by the states parties, they were fully aware, in advance, of al-Bashir's planned visit and consciously chose to ignore their international legal obligations to arrest and surrender, as was the case for Chad (see ICC, 2013g: 3; 2010e: 3), Malawi (see ICC, 2011g: 7), the DRC (see ICC, 2014d: 4) and South Africa (see ICC, 2017h: 5-6).

Now, these observations regarding the alleged voluntary non-compliance of certain states parties and situation states, can be said to pose three problems in relation to compatibility with the theoretical demands of justice, outlined in Chapter Three. First, it is debatable whether the non-compliant actions of the aforementioned states can be said to be serving the interests of the weakest and most vulnerable, defined here as the victims and affected communities of international crimes, outlined as a core feature of justice in Section 3.1.1 and 3.2.1. With regards to the Kenyan non-compliance, the rationale for not complying, to keep control of the narrative of events, buttresses the interests of the current Kenyan government, rather than the victims and affected communities, because there is a possibility that the access to justice for victims and affected communities may be denied as a means for the current Kenyan administration to protect their own image. Similarly, the Sudanese non-compliance can be said to not be acting in the interests of victims and affected communities because the government is not complying in order to protect themselves and their allies from prosecution before the ICC. Finally, the decisions of the states parties to not comply with the ICC's request to arrest and surrender Omar al-Bashir appears to be aimed at serving their own

geopolitical interests, by protecting their neighbour or political allies from prosecution, rather than those of the victims and affected communities who are continually being ignored and denied access to justice and redress mechanisms for the wrongs committed against them. As such, the non-compliance discussed above can be considered to be incompatible with the demand that justice serves the interests of the weakest and most vulnerable, outlined in Section 3.1.1 and 3.2.1, because the actions appear to be serving the geopolitical and/or self-interests of the governments' making them rather than the victims and communities affected by international crimes.

Second, the selectivity of the compliance shown by states parties, such as the DRC government who have fully cooperated with the ICC's investigation and prosecution of rebel leaders and political opponents but refused to arrest and surrender Omar al-Bashir, poses questions relating to the impartiality of such decision-making. As outlined in Section 3.4.3, impartiality demands that arbitrary factors, such as bias, favouritism or prejudice, should not influence decisions. In this context however, it would appear that decisions of certain states parties not to arrest Omar al-Bashir were influenced by pre-existing geopolitical allegiances, namely amongst African Union (AU) members, as well as broader notions of elite solidarity amongst African leaders (see Nutt, 2015; Dersso, 2013b).

For instance, geopolitics were arguably definitive in the Ugandan government's decision to invite, and subsequently not arrest, Omar al-Bashir in May 2016, with the Ugandan government stating that: "the invitation to President Al-Bashir was informed by the standpoint that good relations with all countries in the region is essential" (see ICC, 2016f: 5) and as such "it is not in Uganda's interest and the region's interest to isolate The Sudan by excluding its leader from any occasion that brings together other regional leaders" (see ICC,

2016f: 7-8).²⁷¹ Likewise, references to notions of elite solidarity between African leaders and Omar al-Bashir have been frequent, with the Presidents of Uganda, Yoweri Museveni, and Chad, Idriss Deby, referring to al-Bashir as a “brother” (as cited in Huni, 2016; BBC News, 2010), and Kenya’s Foreign Minister, Moses Wamweru, welcoming al-Bashir as a “neighbour” (as cited in Rice, 2010b) .

Now, although impartiality is difficult to identify and measure, as noted in Section 3.4.3, it can be argued that underlying geopolitical allegiances and notions of elite solidarity, when they result in an obstruction of justice for those accused of international crimes, can perhaps be considered arbitrary factors that should not influence decisions pertaining to compliance with ICC requests. Furthermore, Article 27 of the *Rome Statute* depicts that being a sitting head of state does not entitle an ICC suspect to any preferential treatment and should therefore not be a factor that influences decision-making on ICC issues (see ICC, 2011b: 19). As such, it can be argued that the decision of certain states parties to not comply with the ICC’s request to arrest and surrender Omar al-Bashir is incompatible with the notion of justice as impartiality, as described in Section 3.4.3, because it would appear that al-Bashir is being treated with favouritism by certain African states on the basis of his position as head of state of a neighbouring country and/or by virtue of pre-existing geopolitical allegiances.

Finally, the refusal of certain states parties to comply with ICC arrest and surrender requests can arguably be said to have failed to meet the demands of legal justice, outlined in Section 3.4.4. By signing the *Rome Statute*, states parties enter into a legal agreement and thus hold a *de jure* obligation to comply with the ICC’s decisions and requests. This means

²⁷¹ Geopolitical interests and influences also appeared to shape the Malawian government’s decision not to comply with the ICC’s request to arrest and surrender Omar al-Bashir, stating that: “as a member of the African Union, [Malawi] fully aligns itself with the position adopted by the African Union with respect to the indictment of sitting Heads of State” (see ICC, 2011h: 7-8).

that, in accordance with the principles of legal justice, non-compliant states can be said to have acted unjustly by virtue of failing to uphold the legal commitments they have entered into. Thus, it can be argued that the decisions of states parties not to comply with the ICC's arrest and surrender requests is incompatible with the demands of legal justice, discussed in Section 3.4.4, because they are acting in a manner that violates the legal agreement they have entered into with the ICC.

7.3.3 Summary

To summarise, this Section has argued that the budget adoption practice of the ASP, which has perhaps placed financial strictures onto the ICC, as well as the selective compliance with ICC arrest and surrender requests, from certain states parties and situation states, can be considered to be incompatible with three elements of this thesis' theoretical framework of justice outlined in Chapter Three: serving the interests of the weakest and most vulnerable (Sections 3.1.1 and 3.2.1); justice as impartiality (Section 3.4.3); and notions of legal justice (Section 3.4.4). This is an important observation for this thesis because it affirms the main argument that, for the most part, it is stakeholder practice, not the ICC's purposes and procedures, which have been incompatible with the theoretical demands of justice. Having considered some of the practices of some of the ICC's states parties, both collectively as the ASP and some individually, this Chapter now turns its attention to that of the UNSC.

7.4 The Practice of the UNSC

During her remarks to UNSC meeting 7285 on 23 October 2014, ICC Chief Prosecutor Fatou Bensouda reiterated the possibly mutually dependent relationship between the Security Council and the Court's search for international criminal justice: "the Council assumes a crucial role in the emerging system of international criminal justice and must embrace that

role with all the opportunities for constructive engagement that it provides" (see UN, 2014e: 5). Explaining the content of the ICC/UNSC relationship, Morten Bergsmo and Jelena Pejic divided the role that can, and perhaps even should, be played by the Security Council in relation to the Court's attempts to enforce individual criminal accountability for international crimes into three areas: the power of referral; the power of deferral; and a responsibility to ensure that the ICC's decisions and requests are enforced, particularly those pertaining to situations that have arisen from UNSC referrals (see 2008: 595). However, the extent to which the UNSC has provided the ICC with the desired level of support is debatable. For instance, in an interview conducted for this thesis, Tiina Intelmann, former President of the ASP, argued that: "the Security Council has not been able or willing really to put its full political weight... behind the Court or in support of the Court".²⁷² Furthermore, concerns regarding the apparent insufficiency of UNSC engagement with the ICC have been raised in both academic commentaries (see Verduzco, 2015; Arbour, 2014; O'Donohue, 2014; Popovski, 2014; Kramer and Killeen, 2012; White and Cryer, 2009) and global civil society reports (see Kaye *et al*, 2013; Papenfuss, 2013; Mistry and Verduzco, 2012; Moss, 2012).

These discussions raised a number of areas of concern regarding the UNSC's practice vis-à-vis the ICC in relation to both the referral of situations and the broader enforcement of, and support for, Court decisions and requests.²⁷³ With regards to the UNSC's referral practice, there are five main criticisms which can be summarised as: double standards (see Dicker, 2015a: 6-11; Mistry and Verduzco, 2012: 3-4); hypocrisy (see Zhu, 2014: 1-2; Dicker, 2013b);

²⁷² Interview with Tiina Intelmann, President of the Assembly of States Parties, 16 September 2013.

²⁷³ Here, it is important to note that discussions pertaining to the United Nations Security Council's (UNSC's) deferral practice are absent because the Security Council is yet to defer a physical ICC investigation or prosecution. To date, the UNSC has passed two resolutions deferring the ICC's jurisdiction, 1422 (see UN, 2002b) and 1487 (see UN, 2003), but these were pre-emptive, perhaps even political (see Moss, 2012: 4; Jain, 2005; Stahn, 2003), moves that prevented the Court from conducting investigations and prosecutions against United Nations (UN) peacekeepers from non-state parties.

inconsistency (see Ainley, 2015: 38-39; Trahan, 2013: 429-433; Mistry and Verduzco, 2012: 18-20); politicisation (see Olugbuo, 2014; Kramer and Killeen, 2012); and selectivity (see Dicker, 2015a: 6-11; Popovski, 2014: 281-284; Côté, 2012: 404-406). Additionally, there are a further three criticisms that have been levelled against the UNSC in relation to its post-referral enforcement and support practice: a limiting of the ICC's jurisdiction; a refusal to offer the Court any form of financial assistance; and a failure to follow-up on its referrals once they have been issued (see Verduzco, 2015: 38-50; Kaye *et al*, 2013: 4-8; Papenfuss, 2013: 3-5; Trahan, 2013: 464-467; Mistry and Verduzco, 2012: 7-13; Moss, 2012: 4-10). Now, all of these aforementioned criticisms can be considered matters of concern regarding the UNSC's practice vis-à-vis the ICC, but for issues of time and space this thesis, and subsequently the remainder of this Section, will focus on the two that it considers most relevant to its theoretical discussion: inconsistent referral practice and a lack of adequate, if any, follow-up action.

7.4.1 The UNSC and Situation Selection: Inconsistent Referral Practice

A number of academic commentators (see Ainley, 2015; Hehir and Lang, 2015; Trahan, 2013; Kramer and Killeen, 2012) and global civil society rapporteurs (see Mistry and Verduzco, 2012: 18-20; Moss, 2012: 13; Papenfuss, 2012: 1) have accused the UNSC of being inconsistent in its use of its power of referral. These accusations of inconsistency, in terms of decision/action outcomes, are important for this thesis because, if they can be evidenced, then it could be argued that the UNSC's practice has been incompatible with the notion of justice as consistency outlined in Section 3.4.2. Now, it should be noted that some International Relations commentators, namely realist thinkers such as Hans Morgenthau (1948), Kenneth Waltz (1979) and John Mearsheimer (2001), may question the applicability of an abstract

moral principle, such as the aforementioned justice as consistency, to the workings of the UNSC and international politics more generally.

However, if notions of consistency are not in relation to the UNSC's work vis-à-vis the ICC, then why did 12 of the 50²⁷⁴ delegations present during Security Council meeting 6849 on 17 October 2012, convened to discuss the working relationship between the UNSC and the Court, specifically voice concerns pertaining to the alleged inconsistencies prevalent within the Security Council's referral practice (see UN, 2012h; 2012i)?²⁷⁵ Moreover, if ethical considerations are so irrelevant to matters of international relations, then why do so many academic commentators dedicate so much time and effort to analysing their impact and purporting their existence (see Gaskarth, 2012; 2011; 2006; Frost, 2011; 2009; 1996; Jeffrey, 2008; Lang, 2008; Koskeniemi, 2002b; Smith, 1998)? As such, this thesis would argue that notions of consistency in relation to decisions/actions, as well as broader ethical considerations, are important for both this discussion on the UNSC's practice vis-à-vis the ICC and its efforts to attain individual criminal accountability for international crimes, not least because, in line with the discussion held in Section 3.4.2, visible consistency between the outcomes of decisions/actions by the Security Council is vital for aid outcomes to be viewed as just and subsequently considered legitimate (see Trahan, 2013: 429-433; Mistry and Verduzco, 2012: 18-20; Papenfuss, 2012: 1).

Now, the allegations of inconsistency by the UNSC, in terms of ICC referrals, are often paired with those of selectivity and thus concern the Security Council's decision to refer some

²⁷⁴ Brazil, Chile, Costa Rica, Czech Republic, the European Union (EU), France, Lesotho, Lithuania, Netherlands, Switzerland, Togo and Uruguay.

²⁷⁵ Similarly, "questions of consistency" were raised as core concerns regarding the UNSC's practice vis-à-vis the pursuit of individual criminal accountability by the participants of the UN workshop entitled *Accountability and Fact-Finding Mechanisms for Violations of International Humanitarian Law and Human Rights Law* held on 1 November 2011 (see UN, 2011f: 1-2).

situations and not others (see Ainley, 2015: 38-39; Hehir and Lang, 2015; Mistry and Verduzco, 2012: 3-7; Kramer and Killean, 2012: 133-138). However, although this form of inconsistency does exist, as will be outlined below, it can also be argued that the UNSC has been inconsistent with regards to its referrals of the Darfur and Libya situations, in terms of their context and the approach followed. On face value, this observation perhaps further affirms the argument that the UNSC's practice has been incompatible with the demands of justice as consistency. But, recalling the discussion from Chapter Five, it can be argued that the pursuit of international criminal justice serves many purposes. This means that the pursuit of individual criminal accountability through the ICC is perhaps intended to, or at the very least purported to, serve many different objectives; a reality which could help explain, and defend, the different approaches followed by the UNSC in relation to the situations in Darfur and Libya. Thus, this thesis would argue that, on their own, the inconsistencies in context of, and approach followed by the UNSC in, the Darfur and Libya situations does not necessarily equate to practice that is incompatible with the demands of justice. This is because it is conceivable that the Darfur and Libya situations may just represent two cases which exert different, but equally genuine, claims of desert for the UNSC and ICC's attention and resources. Nonetheless, this thesis will argue that the inconsistency of the UNSC's approach to the Darfur and Libya referrals, as well as the large contextual differences of the situations at the time of their referrals, actually serves to highlight the inconsistency shown by the Security Council elsewhere.

Having accused the UNSC of inconsistent practice vis-à-vis ICC referrals, this thesis now turns its attention to evidencing how the Security Council has been inconsistent and then analysing the issues this inconsistency poses with regards to the compatibility of the UNSC's ICC related practice with the theoretical demands of justice. Asides from the aforementioned

inconsistencies between the Darfur and Libya situations, it has also been suggested that the UNSC's inconsistency is demonstrated through the number of situations not referred to the ICC that perhaps could, or even should, have been; with the situations in Gaza, North Korea, South Sudan, Sri Lanka, Syria, Yemen and Zimbabwe all being identified as potential candidates for referral to the Court (see Ainley, 2015: 38; Dicker, 2015b; Papenfuss, 2013: 3; Trahan, 2013: 430-431; Kramer and Killean, 2012: 133-138; Mistry and Verduzco, 2012: 4; Moss, 2012: 11-12). However, in order to highlight the inconsistency of the UNSC's practice as clearly as possible, this thesis will focus on the Syrian situation because, at the time of writing, it is the only other situation, besides from the successful referrals of Darfur and Libya, where a physical attempt by members of the Security Council to refer a situation to the ICC has been made.²⁷⁶ Furthermore, the failure to agree on referring the Syrian situation to the ICC, despite a plethora of evidence accusing all sides in the conflict of committing mass atrocity crimes, is perhaps the most controversial decision of the UNSC pertaining to ICC referrals. Thus, the remainder of this Sub-Section will be dedicated to evidencing the UNSC's inconsistent ICC referral practice through a comparison of the Darfur, Libyan and Syrian situations across three areas: the approach followed prior to the referral vote; the perceived severity, or gravity, of the situations in question; and the justifications for voting actions, with a focus on those of China and Russia.

The first area of inconsistent practice can be seen in the approach followed by the UNSC prior to the referral votes being held. With regards to the Darfur situation, the details displayed in Table 7.4 show that the conflict in Darfur had been active for over two years and that the situation had been the subject of much UNSC discussion, 22 meetings, and action, 8

²⁷⁶ This occurred on 22 May 2014 but the efforts were vetoed by both China and Russia (see UN, 2014a).

Table 7.4 - Table Showing the Steps Taken Prior by the UNSC for the Darfur, Libyan and Syrian Situations

Details about Situation	Situation		
	Darfur	Libya	Syria
Start of Conflict or Violence	February 2003	February 2011	March 2011
Date of First Discussion Before UNSC	2 April 2004	22 February 2011	27 April 2011
Date of ICC Referral Vote	31 March 2005	26 February 2011	22 May 2014
Number of UNSC Meetings Held Prior to ICC Referral Vote	22	2	26
Number of UNSC Resolutions Passed Prior to ICC Referral Vote	8	0	9
UN Commission of Inquiry Report Published (Number Published)	Yes (1)	No	Yes (7)
Outcome of Vote	Referred to ICC	Referred to ICC	No Referral

(Sourced: Security Council Report, 2017a; 2017b; 2017c)

resolutions, before Resolution 1593 referring the Darfur situation to the ICC was adopted on 31 March 2005. Moreover, the *International Commission of Inquiry on Darfur*, an independent investigatory body established by UNSC Resolution 1564 (see UN, 2004) to examine alleged violations of international criminal law in the Darfur conflict, presented their findings on 25 January 2005 (see UN, 2005d), which included evidence of widespread atrocities. Thus, it could be argued that the approach followed in relation to the Darfur situation depicts the ICC referral as a reaction²⁷⁷ to independently verified allegations of international crimes and as, in the words of participants at Chatham House’s seminar on the UNSC/ICC relationship, an act of “last resort, when other non-forcible measures have been exhausted” (see Mistry and Verduzco, 2012: 5).²⁷⁸

In contrast, the approach followed prior to the Libya referral was very different, with Table 7.4 showing that the Libyan conflict had only been active for nine days and that the situation has been the subject of very little previous UNSC discussion, 2 meetings, and no-

²⁷⁷ Supporting this reactionary argument, UNSC Resolution 1593 states that it was adopted after “taking note of the report of the International Commission of Inquiry on violations of international humanitarian and human rights law in Darfur” (see UN, 2005d: 1).

²⁷⁸ From the outset the ICC was posited as an alternative to military intervention, see Section 2.2.3.

prior action, 0 resolutions, before Resolution 1970 referring the Libyan situation to the ICC was adopted on 26 February 2011. Furthermore, the speed at which the UNSC referral was made meant that the Security Council's action and the Human Rights Council's (HRC's) establishment of the *International Commission of Inquiry on Libya* (see UN, 2011g), an independent investigation into alleged violations of international criminal law, occurred simultaneously.²⁷⁹ Therefore, whereas the Darfur referral could be classed as a reaction to independently evidenced allegations of atrocities, the approach followed prior for the Libyan situation depicts the ICC referral as proactive and part of the broader responsibility to protect efforts (see Ainley, 2015; McMillan and Mickler, 2013; Stahn, 2012) aimed at preventing atrocities from being committed on a large scale (see Hayner, 2013; Williams, Ulbrick and Worboys, 2012: 487-488).

Finally, and where the inconsistency of the UNSC's practice can be highlighted, is the fact that the Security Council followed neither the proactive nor the reactive approach in relation to the Syrian situation. On the one hand, from Table 7.4, it can be seen that the proactive referral approach was not followed because it was over two months after the outbreak of conflict before the situation was first discussed by the UNSC and over three years before the ICC referral vote was held. On the other hand, the refusal of the UNSC to agree on referring the Syrian situation to the ICC on 22 May 2014, despite having been the subject of extensive Security Council discussion, 26 meetings, and action, 9 resolutions, as well as the HRC's *Independent International Commission of Inquiry on the Syrian Arab Republic* publishing seven reports evidencing alleged atrocities, demonstrates that the reactive referral approach was not followed. In fact, given that the numbers pertaining to the Syrian situation, as shown

²⁷⁹ In fact, the findings of the *international Commission of Inquiry on Libya* were not published until the 2 March 2012 (see UN, 2012j).

in Table 7.4, are higher than those for the Darfur situation it could be argued that the “last resort” stage had been reached and thus, in keeping with the demands of justice as consistency outlined in Section 3.4.2, a referral to the ICC could be considered the correct response. In short, when compared with the UNSC’s responses to the Darfur and Libyan situations, it can be argued that the UNSC’s response to the Syrian situation displays inconsistency in their practice, an allegation which is perhaps further affirmed by comparing the gravity of the situations at comparable times in their lifecycle.

The abovementioned inconsistency shown by the UNSC over the Syrian situation could be defended and explained if the gravity of the situations was different (see Brown, 2003).²⁸⁰ As outlined in Sections 6.4 and 7.2.1, one way of measuring gravity before the ICC is quantitatively in accordance with reported figures on deaths and displacements.²⁸¹ When these figures are compared for the Darfur, Libyan and Syrian situations, as done in Table 7.5, the similarities, at comparable stages in the situations’ lifecycles, is striking, thus perhaps illustrating the inconsistency of the UNSC’s practice. For example, Table 7.5 shows that the initial number of deaths from the Libyan and Syrian conflicts, 500-700 and 450-650 respectively, were almost identical. Likewise, Table 7.5 shows that at the time of their referral, the death toll from the Darfur and Syrian conflicts. 180,000 and 190,000 respectively, were very similar. In addition to comparable death toll figures, the number of displacements stemming from the Syrian conflict, 9,400,000, far exceeds the 2,000,000 reported as a result

²⁸⁰ Remembering the observations in Sections 5.3 and 6.4, which defined the ICC’s mandate in relation to gravity thresholds.

²⁸¹ It should be noted that not all deaths and displacements occur as a result of international crimes. However, the nature of the conflicts under discussion, particularly the deliberate manner in which citizens have been specifically targeted by government attacks, means that these figures can give an indication of the gravity of the crimes being committed (see Civitas Maxima, 2016: 13; ICRC, 2015).

Table 7.5 - Table Showing Elements of Gravity for the Darfur, Libyan and Syrian Situations

Situation		Gravity Criteria		
		Reported Number of Deaths	Reported Number of Internally Displaced Persons (IDPs)	Reported Number of Refugees
Darfur		180,000	1,800,000	200,000
Libya		500-700	25,000	140,000
Syria	Initial Violence	450-650	Minimal	20,000
	Referral Vote	190,000	6,400,000	3,000,000

(Sourced: OHCHR, 2014; UNHCR, 2014; ICC, 2011a; BBC News, 2005)

of the Darfur conflict. However, despite these apparent similarities in gravity, at comparable stages in the conflicts' lifecycles, the UNSC's inability to agree on referring the Syrian situation to the ICC perhaps shows that the Security Council's practice has failed to meet the demands of justice as consistency discussed in Section 3.2.2.

The final areas where inconsistency can be seen is in relation to the justifications given by China and Russia for their voting actions. In general, it should be noted that the three ICC referral votes resulted in different outcomes: the Darfur resolution passed but with two abstentions from the United States (US) and China; the Libya resolution passed with unanimous support; and the Syria resolution was vetoed by both China and Russia. However, as displayed in Table 7.6, the voting justifications given by China and Russia appear to be inconsistent, or even contradictory, with one another. For example, the Chinese delegations' justifications for opposing the UNSC's course of action in both Darfur and Syria was that the pursuit of individual criminal accountability, at the international level, would "complicate" (see UN, 2005a: 5) and "jeopardize" (see UN, 2014a: 14) the political efforts to resolve the crises. Yet, following their vote in favour of referring the Libyan situation to the ICC, the Chinese delegation explained their support on the basis that the Court's demands for individual criminal accountability could help "resolve the current crisis through peaceful means" (see UN, 2011a: 4). Thus, it appears that China has been inconsistent in their

Table 7.6 - Table Showing Voting Justifications of the P5 During the Darfur, Libya and Syria ICC Referral Votes

P5 Member		Situation		
		Darfur	Libya	Syria
China	Action	Abstained	In Favour	Veto
	Justification	Opposition to the ICC Threaten Peace Process	Support Peace Process	Opposition to the ICC Threaten Peace Process
France	Action	In Favour	In Favour	In Favour
	Justification	Support Peace Process	Support Peace Process	Support Peace Process
Russia	Action	In Favour	In Favour	Veto
	Justification	Support Peace Process	Support Peace Process	Threaten Peace Process
United Kingdom	Action	In Favour	In Favour	In Favour
	Justification	Support Peace Process	Support Peace Process	Support Peace Process
United States	Action	Abstained	In Favour	In Favour
	Justification	Opposition to the ICC	Support Peace Process	Support Peace Process

(Sourced: UN, 2014a; 2011a; 2005a)

arguments as to the impact of internationally pursued individual criminal accountability, suggesting that it can both buttress and obstruct peace efforts.

Likewise, the justifications of the Russian delegations appear to display the same levels of inconsistency. On the one hand, the Russian delegations supported the UNSC's proposed actions for Darfur and Libya on the basis that the pursuit of individual criminal accountability, at the international level, would help bring "normalization and stability" in Darfur (see UN, 2005a: 10) and help the Libyan people "find a peaceful way out of the current crisis" (see UN, 2011a: 4). Whereas, on the other hand, the Russian delegation's justification for vetoing the UNSC's proposed referral of the Syrian situation to the ICC was that it would only serve to "further inflame political passions" and that it risked "escalating the Syrian crisis" (see UN, 2014a: 13). In other words, as with the Chinese delegations, it would seem that the Russian delegations' justifications for their voting actions, in relation to the potential impacts of an ICC referral, have been inconsistent inasmuch as they have argued that the pursuit of

individual criminal accountability, at the international level, can both impede and improve peace efforts.

In short, it can be argued that, in light of the evidence provided by the above discussions, the UNSC's practice have been highly inconsistent. This inconsistency, highlighted by the differing cause of action taken by, and responses from, the UNSC in relation to the Syrian situation visavis those of Darfur and Libya, is perhaps indicative of the Security Council's ICC referral practice being considered to be incompatible with the theoretical demands of the notion of justice as consistency, outlined in Section 3.4.2, which demands that situations that are comparable in context be treated the same. However, aside from inconsistency being problematic for justice in itself, two broader conclusions regarding the UNSC's practice can be drawn from this inconsistent action. First, the inconsistency in approach and gravity shown by the UNSC suggests that there is no formal criteria and/or process to be followed when the Security Council makes referrals to the ICC (see Papenfuss, 2013: 1; Mistry and Verduzco, 2012: 5; Moss, 2012: 12). Second, the inconsistency in the Chinese and Russian justifications for their voting actions in relation to the Darfur, Libyan and Syrian situations, perhaps demonstrates that the alleged peace/justice dichotomy (see Clark, 2011; HRW, 2009; ICTJ, 2009; Akhavan, 2009; Keller, 2008b; 2008a; Bassiouni, 1996b) is in fact a socially constructed binary opposition triggered only when it supports certain desirable political outcomes.²⁸² In turn, these two conclusions can be used to support a suggestion that the UNSC's practice has been incompatible with some of the theoretical demands of justice, outlined in Chapter Three, for three reasons.

²⁸² In support of this argument, it is useful to recall that the UNSC has previous established two international tribunals on the premise that justice, achieved through the administration of individual criminal accountability, is a pre-requisite for a sustainable peace.

First, the observation that there is no formal criteria and/or process for guiding UNSC referrals to the ICC is an issue because of the mutually dependent relationship that exists between notions of justice as process and outcome, as discussed in Section 3.4.6. Here, although outcomes arguably take precedence they are required to be produced through just processes because it is these processes that give said outcomes credibility and legitimacy. In this context, the lack of a formal decision-making process for making ICC referrals leaves the outcomes produced, whether it be the referral or non-referral of situations, open to external criticism, including allegations of unjust selectivity and inconsistency like those outlined above. Whereas, if a formal decision-making process existed then not only would the outcomes produced possess a degree of societal acceptance but also the environment in which the abovementioned inconsistencies can exist would be removed because there would be a standardised manner in which the UNSC would respond to allegations of international crimes. In short, the lack of a formal decision-making process for UNSC referrals to the ICC, which potentially contributed to the inconsistency in the Security Council's practice, can be said to be incompatible with the theoretical demands of justice because the notions of justice as process required to give the outcomes of decisions credibility and legitimacy are absent.

Second, and sticking with the theme of a lack of a formal decision-making criteria and/or process, it can be argued that the lack of such an arrangement means that UNSC decisions are vulnerable to manipulation inasmuch as they can be influenced by the vagaries of decision-making within the Security Council, including the P5's individual interests and/or those of their allies. This realisation may be problematic because it could suggest that the UNSC's ICC referral decisions have not been made in accordance with the demands of impartiality outlined in Section 3.4.3. This is because notions of justice as impartiality demand that decisions are only influenced by matters that can be considered relevant considerations,

so that undesirable factors, such as bias, favouritism or prejudice, can be removed. In this context, the speed of the UNSC's actions over Libya perhaps suggest that the goal was more than merely upholding international peace and security. As outlined in Section 2.2.3, it has been suggested that the referral of the Libyan situation to the ICC was seen as a means through which Muammar Gaddafi could be removed from power. Now, regime change is not *per se* problematic for a discussion on the ICC because, as discussed in Section 1.3.3, removing international pariahs responsible for committing heinous atrocities against their own people was an initial justification for an international criminal court and reports at the time of the Libyan referral suggest that the Gaddafi regime were committing mass atrocity crimes against their opponents. However, where using the ICC as a tool of regime change can be considered problematic is when the same practice is not followed in a situation of comparable context, such as that in Syria less than one month later. As such, the inconsistent responses of the UNSC to the Libyan and Syrian situations perhaps indicates that the decisions of certain Security Council members were in part driven by an underlying prejudice against the Gaddafi regime and a contrasting element of favouritism towards the Assad administration; thus perhaps indicative of the decisions on referring Libya and not referring Syria to the ICC not being made impartially. In sum, the UNSC's practice can possibly be considered incompatible with the demands of justice as impartiality because, although impartiality can be difficult to measure, it is debatable whether immediate regime change, prior to any serious violations of internationally recognised humanitarian norms, or protecting allies, despite evidence that they may be responsible for serious violations of international criminal law, can be considered to be matters that should influence decisions on ICC referrals.

Moving away from the absence of a formal decision-making mechanism, the final issue relates to whose interests are being served by UNSC decisions. John Rawls' difference

principle logic, outlined in Section 3.2.1, depicts that inequalities in the distribution of rights and duties, such as the one seen amongst the UNSC's permanent members, can only be justified if they provide compensating benefits for the weakest and most vulnerable members of a society. Using this logic, it is possible to highlight a potential problem with the UNSC's compatibility with justice's demand that decisions serve the interests of the weakest within a given transaction. In this context, it is highly debatable whether the decision of China and Russia to veto the referral of the Syrian situation to the ICC, despite strong evidence of international crimes having been committed, can be said to be serving the interests of the weakest or most vulnerable in this given transaction, namely the victims and communities affected by international crimes. This is because it is questionable whether obstructing the access of victims and affected communities to justice and redress mechanisms, as well as allowing the perpetrators of international crimes to continue to act with impunity, can be said to be acting in the interests of the weakest and most vulnerable within the transaction. Instead, rather than serving the interests of victims and affected communities, it is possible that the Chinese and Russian decisions actually, and were possible even intended to, serve their own political interests by protecting their regional ally the Assad government. Thus, it can be argued that China and Russia's decision to veto the referral of the Syrian situation to the ICC is incompatible with the theoretical demands of justice because it is debatable if voting to protect your allies, despite compelling evidence of them having been responsible for committing international crimes, can be said to be acting in a manner compatible with the demands of the difference principle outlined in Section 3.2.1.

7.4.2 The UNSC and Support for its Referrals: A Lack of Follow-Up Action

During UNSC meeting 6849, the Swiss delegation stated that: "referrals should not be the end of the Security Council's commitment to end impunity; rather they should be the beginning"

(see UN, 2012i: 20). This sentiment was echoed by Tiina Intelmann, in an interview for this thesis, who argued that once the UNSC makes a referral the “the hope of the Court is that the Security Council keeps a watchful eye on these proceedings and offers its political support whilst the Court is dealing with the situation”.²⁸³ Similarly, an international legal practitioner interviewed stated that it is “important for the Security Council... to assume responsibility of saying ‘we referred it, therefore, we are going to give the Prosecutor the capacity, the support, the pressure required to fulfil his or her mandate’”.²⁸⁴ In other words, there appears to be a consensus behind the argument that one of the UNSC’s duties is to support the ICC in its search for accountability and justice once a referral has been made.

One possible way that the UNSC can support the ICC’s search for accountability and justice, that has been given much coverage, is through the practice of following-up on the referrals it makes. For example, a representative from the ICC’s Registry interviewed for this thesis argued that: “it’s very important that the Council keeps following-up on these things... and keeps supporting the Court... once it has referred a situation”.²⁸⁵ The importance of this follow-up action was perhaps affirmed by the fact that during UNSC meeting 6849, 34 of the 50 state delegations present directly referenced the existence of a need for the Security Council to partake in adequate follow-up actions once a referral has been made (see UN, 2012h; 2012i). Likewise, the time and effort dedicated by global civil society actors to lobbying the Security Council to follow-up on its referrals possibly further affirms the necessity of this practice (see Kaye *et al*, 2013: 17 and 20; Papenfuss, 2013: 4-5; Mistry and Verduzco, 2012: 8-10; Moss, 2012: 13). In fact, the International Peace Institute (IPI) even argued that: “follow-

²⁸³ Interview with Tiina Intelmann, former President of the Assembly of States Parties, 16 September 2013.

²⁸⁴ Interview with an international legal practitioner, 12 September 2013.

²⁸⁵ Interview with ICC Registry representative, 20 June 2013.

up action by the Security Council once a referral has been made is almost as important as the referral itself” (see Papenfuss, 2013: 4-5).

Moreover, in its *Decision on the Non-Compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir*, issued on 26 March 2013, Pre-Trial Chamber II (PTC II) offered a rationale that perhaps explains why the abovementioned UNSC follow-up action is required: “if there is no follow up action on the part of the Security Council, any referral by the Council to the ICC... would never achieve its ultimate goal, namely, to put an end to impunity” (see ICC, 2013g: 10). In other words, a failure of the UNSC to offer the ICC adequate support by following-up on its referral decisions could have hamstrung the Court, preventing it from fulfilling its mandate and achieving any of its broader objectives, such as norm diffusion, deterrence or improving international peace and security (see Papenfuss, 2013: 5; Trahan, 2013: 467). Therefore, in theory at least, because the success of the referrals rests on the ICC making successful prosecutions, it could be expected that the UNSC have a vested interest in following-up on its referrals to ensure that the Court is able to complete its task.

However, as alluded to in the Introduction to this Section, there are a plethora of suggestions and evidence that suggests that the UNSC has failed, or at times even outright refused, to follow-up on its referrals; despite it appearing in their interests to do so. For instance, during UNSC meeting 6849, Song Sang-Hyun, the then ICC President, noted that for both the Darfur and Libyan situations “it is clear that follow-up to the referrals... has sometimes been problematic” (see UN, 2012h: 4). Likewise, in their report on the UNSC/ICC working relationship, the International Justice Clinic accused the Security Council of “los[ing] interest” once it has made a referral and joined their global civil society partners in ridiculing

the UNSC's lack of follow-up action (see Kaye *et al*, 2013: 17; see also Justice for Darfur, 2008). Finally, both of the ICC's Chief Prosecutors, Luis Moreno-Ocampo and Fatou Bensouda, have used their biannual UNSC briefings on the Darfur and Libya situations to chastise and lambast the Security Council's lack of follow-up action; with Bensouda, during UNSC meeting 6887 on 13 December 2012, asking: "how many more civilians must be killed, injured and displaced for the Council to be spurred into doing its part?" (see UN, 2012k: 2).²⁸⁶

Now, perhaps the area where UNSC follow-up action is most needed is in relation to instances of non-compliance by states with ICC arrest warrants. Supporting this suggestion, a representative from the American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC) interviewed for this thesis argued that: "I think it [the UNSC] should issue... specific directives for compliance with the Court's orders".²⁸⁷ However, during her remarks to UNSC meeting 7337, on 12 December 2014, Fatou Bensouda outlined that such directives had never occurred: "in the almost 10 years that my Office has been reporting to the Council, no strategic recommendation has ever been provided... and neither have there been any discussions resulting in concrete solutions to the problems we face" (see UN, 2014f: 2). Likewise, a representative interviewed from the Coalition for the International Criminal Court (CICC) argued that: "in situations where there have been referrals by the UN Security Council... [it] has not been able or willing to enforce non-compliance decisions, even where the Registrars' Office has written to them".²⁸⁸

²⁸⁶ Either, Luis Moreno-Ocampo or Fatou Bensouda condemned the lack of UNSC follow-up during meetings: 5789, 5905, 6028, 6336, 6440, 6688, 6974, 7059, 7080, 7173, 7199, 7306, 7337, 7441, 7478, 7582, 7698, 7710, 7806, 7833 and 7963. Data correct as of August 2017.

²⁸⁷ Interview with representative from American Non-Governmental Organization Coalition for the International Criminal Court (AMICC), 16 September 2013.

²⁸⁸ Interview with representative from the Coalition for the International Criminal Court (CICC), 21 May 2014.

In support of these claims, the figures in Table 7.7 show that the ICC's Chambers have referred instances of non-compliance, in five separate cases across both the Darfur and Libyan situations, to the UNSC for their consideration on 14 occasions. However, as of yet the UNSC has not taken any form of action, be that rhetorical condemnation of the transgressions or a more physical form of sanction, in response to these referrals. Furthermore, the lack of UNSC follow-up, particularly in relation to the Darfur situation, is demonstrated by the fact that only one of the 40 Security Council Resolutions, number 1828, concerning the Darfur conflict passed after the ICC referral directly mentions the Court's investigation (see Security Council Report, 2017d). Now, it should be noted that there have been attempts to address this lack of UNSC follow-up action, with the Argentinian government using their Security Council Presidency powers to convene meeting 7285 which intended to "provide an opportunity for Member States to continue to discuss the establishment of a mechanism to demonstrate the Security Council commitment to an effective follow-up of its referrals" (see UN, 2014g: 7). Nevertheless, this effort did not yield any success and any UNSC follow-up actions remain noticeably absent.

These are important observations for this thesis' argument that the UNSC's practice has been incompatible with justice for three reasons. First, in Section 3.2.2 it was noted that justice, when embedded in institutions, exerts a physical coercive power of compliance over states because said institutions increase the costs connected to non-compliance. However, as mentioned in Section 6.5, the ICC does not possess any independent enforcement capabilities and as such is solely reliant on its stakeholders, particularly states parties and the UNSC, being prepared to create the costs that could encourage future compliance with the Court's requests. But, the aforementioned failure or refusal of the UNSC to respond to the 14 referrals of non-compliance received from the ICC, detailed in Table 7.7, perhaps means that justice

Table 7.7 - Table Showing the Cases where Non-Compliance has been Referred to the UNSC²⁸⁹

Case	Situation	State Referred	Date of Referral
Ahmad Muhammad Harun and Ali Muhammad Ali Abd-al-Rahman	Darfur	Sudan	25 May 2010
Abdel Raheem Muhammad Hussein	Darfur	Sudan	26 June 2015
Abdallah Banda Abakaer Nourain	Darfur	Sudan	19 November 2015
Omar Hassan Ahmad al-Bashir	Darfur	Djibouti	11 July 2016
		Uganda	11 July 2016
		Sudan	9 March 2015
		Democratic Republic of Congo	9 April 2014
		Chad	26 March 2013
		Chad	13 December 2011
		Djibouti	12 May 2011
		Malawi	12 December 2011
		Chad	27 August 2010
		Kenya	27 August 2010
Saif al-Islam Gaddafi	Libya	Libya	10 December 2014

(Sourced: ICC, 2017a)

has not been able to exert the physical coercive power of compliance envisaged in Section 3.2.2. Support for this argument, is possibly evidenced not only by the sheer number of states that have been non-compliant with certain ICC requests but also by the fact that Chad, Djibouti and Sudan have been multiple non-compliant offenders; thus suggesting that the perceived costs of non-compliance are less than the perceived benefits. In short, it can be argued that the UNSC's failure to follow-up on its referrals is incompatible with the theoretical demands of justice because by not establishing any costs for instances of non-compliance the Security Council has negated the physical coercive power to comply that justice can exert.

Second, despite the Argentinian government attempting to build a consensus behind creating a "formal mechanism" for follow-up action in October 2014 (see UN, 2014g: 7), such a procedural arrangement remains non-existent at the time of writing. This is in stark contrast to how the UNSC acted following its decision to create the ICTY and ICTR when it established

²⁸⁹ Data correct as of August 2017.

the *Informal Working Group on International Tribunals* (see UN, 2017b) to specifically deal with allegations of non-compliance with requests issued by the *ad hoc* tribunals. Moreover, besides from perhaps indicating a lack of desire to support the ICC's work, this is also important because of the mutually dependent relationship between notions of justice as process and outcome discussed in Section 3.4.6. In this context, it is possible to suggest that the outcome, no follow-up action, is considered problematic because it has not arisen as a result of discussions that have been made by a formal mechanism. As outlined in Section 3.4.6, when decisions are made through a just, formal process the outcomes produced possess a degree of credibility and legitimacy. Whereas, absent of a just, formal process, outcomes are left vulnerable to external criticism and possibly considered illegitimate and non-credible. In other words, it could be argued that if the decisions to not follow-up on referrals and allegations of non-compliance had been made through a formal decision-making mechanism, such as the one established for the *ad hoc* tribunals, then it would perhaps have been less controversial. Thus, it is possible to suggest that the UNSC's practice, in relation to a lack of follow-up actions on its referrals and allegations of non-compliance with ICC requests, is incompatible with the theoretical demands of justice because the decision-making arrangement lacks the formal process that would give the outcomes societal acceptance.

Finally, it is debatable whether the actions of the UNSC, in not following-up on their referrals, is compatible with the demands of the difference principle, outlined in Section 3.2.1, that an unequal distribution of rights and duties, within the Security Council, is only defensible on the basis that it serves the interests of the weakest members of society; namely the victims of, and communities affected by, international crimes. Here, it is important to look beyond the immediate outcome of no follow-up action, to the longer term impact of such a practice. At the heart of this suggestion, is the observation that the UNSC's failure or

refusal to follow-up on its Darfur referral has led to a stagnation of ICC proceedings their (see Papenfuss, 2013: 5; Trahan, 2013: 466).²⁹⁰ This stagnation did lead to ICC Chief Prosecutor Fatou Bensouda claiming that she was indefinitely suspending all the Darfur proceedings until such a time when, in her words, “there is a change of attitude and approach” from the UNSC (see UN, 2014f: 2);²⁹¹ although in reality the Darfur proceedings have not been fully suspended they are just run with a limited workforce and funding. Nonetheless, even though the Darfur proceedings are not suspended, the failure of the UNSC to follow-up on its referral has caused issues with regards to the ICC’s ability to pursue its mandate. Therefore, it can be argued that the UNSC’s decision not to conduct follow-up activities in Darfur is incompatible with the theoretical demands of justice because it is debatable whether actions that have resulted in a stagnation of ICC proceedings, and subsequently not only obstructed the access of victims and affected communities to mechanisms of justice and redress but also allowed their tormentors to continue to act with impunity, can be said to be acting in the interests of the weakest and most vulnerable.

7.4.3 Summary

To summarise, this Section has argued that the UNSC’s inconsistent referral practice, as well as its failure or refusal to follow-up on referrals it has made, can be considered to be incompatible with five elements of this thesis’ theoretical framework of justice outlined in Chapter Three: justice as consistency (Section 3.4.2); serving the interests of the weakest and most vulnerable (Sections 3.1.1 and 3.2.1); justice as impartiality (Section 3.4.3); the mutual dependency of notions of justice as process, outcome and virtue (Section 3.4.6); and the

²⁹⁰ Today, the same impact could be said to have occurred in Libya as well.

²⁹¹ During UNSC meeting 7337, on 12 December 2014, Fatou Bensouda stated that: “faced with... limited resources... and given the Council’s lack of foresight on what should happen in Darfur, I am left with no choice but to put investigative activities in Darfur on hold” (see UN, 2014f: 2).

physical coercive power of justice (Section 3.2.2). This is an important observation for this thesis because it affirms the main argument that, for the most part, it is stakeholder practice, not the ICC's purposes and procedures, which have been incompatible with the theoretical demands of justice.

7.5 Chapter Summary

To summarise, this Chapter analysed the practice of four of the ICC's primary stakeholders, the OTP, the Chief Prosecutor, the states parties and the UNSC, and the extent to which some of their actions can be considered to have been compatible with elements of the normative framework of justice outlined in Chapter Three.

For the OTP, it was argued that their decision-making practice has resulted in large levels of inconsistency in the amount of time situations spend under Preliminary Examination. This inconsistent practice, and broader conclusions inferred from it, was considered to be incompatible with three elements of the theoretical framework of justice outlined in Chapter Three: justice as consistency (Section 3.4.2); serving the interests of the weakest and most vulnerable (Sections 3.1.1 and 3.2.1); and justice as impartiality (Section 3.4.3).

For the Chief Prosecutor, it was argued that certain decisions made by Moreno-Ocampo, in relation to the Ugandan and Darfuri situations, and Bensouda, regarding the Kenyan and Ivorian situations, perhaps show that they have not displayed the virtues that are expected of the ICC's Chief Prosecutor. These allegations of unvirtuous behaviour, and the broader conclusions drawn from their decisions, were considered to be incompatible with three elements of the theoretical framework of justice outlined in Chapter Three: justice as individual virtue (Section 3.4.5); the mutual dependency of notions of justice as process,

outcome and virtue (Section 3.4.6); and serving the interests of the weakest and most vulnerable (Sections 3.1.1 and 3.2.1).

For the states parties, it was argued that their practice relating to budget adoption has perhaps placed financial strictures onto the ICC. Moreover, it was suggested that certain states parties and situation states had consciously been inconsistent in their compliance, or simply outright refused to comply, with requests from the ICC to arrest and surrender certain individuals. This non-compliant practice, in relation to resource cooperation and the arrest and surrender of suspects, and some broader conclusions inferred from the decisions, was considered to be incompatible with three elements of the theoretical framework of justice outlined in Chapter Three: serving the interests of the weakest and most vulnerable (Sections 3.1.1 and 3.2.1); justice as impartiality (Section 3.4.3); and notions of legal justice (Section 3.4.4).

Finally, for the UNSC, it was argued that their referral practice, in relation to the Darfur, Libya and Syria situations, has been inconsistent. Furthermore, it was suggested that, once referrals have been made, the UNSC has failed, or worse refused, to follow-up on these referrals and offer political leverage for the ICC's investigations. This inconsistent referral practice and refusal to support the ICC once a referral has been made, as well as the broader conclusions drawn from these decisions, were considered to be incompatible with five elements of the theoretical framework of justice outlined in Chapter Three: justice as consistency (Section 3.4.2); serving the interests of the weakest and most vulnerable (Sections 3.1.1 and 3.2.1); justice as impartiality (Section 3.4.3); the mutual dependency of notions of justice as process, outcome and virtue (Section 3.4.6); and the physical coercive power of justice (Section 3.2.2).

In short, the incompatibility of some of the practices of what this thesis considers to be the four primary ICC stakeholders, the OTP, Chief Prosecutor, states parties and UNSC, with elements of this thesis' theoretical framework of justice, as outlined in Chapter Three, is important because it affirms the main argument of this thesis that, for the most part, it is stakeholder practice, not the ICC's purposes and procedures, which have been incompatible with the theoretical demands of justice. Having, in the final analytical chapter, discussed the practice of the ICC's four primary stakeholders, and analysed their compatibility with this thesis' normative framework of justice, the next Chapter will offer this study's conclusions and reflections.

Chapter Eight

Conclusions and Reflections

8.1 Introduction

This research has added depth and further insight into the controversies that surround the International Criminal Court (ICC). Drawing on a Rawlsian understanding of justice, this thesis developed an original normative framework for analysing the ICC and, more generally, international relations. This framework, outlined in Chapter Three, was then applied to three aspects of the ICC, its purposes, its procedures and stakeholder practices, in order to develop a holistic understanding of the Court and offer some explanations behind its apparent shortcomings. Building on data collected from many sources, including interviews, speeches, ICC decisions, judgments and policies, United Nations Security Council (UNSC) meeting transcripts, and empirical observations, this thesis has analysed the compatibility of the aforementioned aspects with the broader theoretical framework on justice. By using this original framework this research provides new criticisms and explanations relating to the ICC's design, infrastructure and overall performance, such as: the cost-benefit rationales of complementarity and gravity; the mutually dependent link between notions of justice as process, outcome and virtue with regards to decision-making by, and pertaining to, the ICC; and a broader understanding of cooperation and non-cooperation. Moreover, considering three distinct elements of the ICC allowed this thesis to offer a balanced analysis of the Court which contrasts with much of the current literature which is heavily polarised. In short, this thesis argues that, for the most part, the aspects of the ICC's operations that are incompatible with the demands of justice, as identified in Chapter Three, are the practices of some of the Court's core stakeholders, rather than its purposes or procedures.

Having outlined the primary contributions and line of argument of this thesis, this conclusion will now reflect and summarise the main findings from the previous three analytical Chapters in Section 8.2, 8.3 and 8.4. Section 8.5, will then highlight any methodological issues and limitations related to the study, and how they may be addressed in future research. Following this, Section 8.6 will discuss the contributions of the research, both empirically and theoretically, to the literature and study of the ICC and international criminal justice as well as the broader fields of International Relations, Ethics and Law, with a particular focus on their interrelationship. These contributions will then be used to suggest some areas suitable for further investigation and research. Finally, Section 8.7 will offer some concluding remarks on the study, the future of the ICC and the broader search for international criminal justice.

8.2 Purpose

Part of this research's agenda was to analyse the extent to which the purposes accredited to the ICC are compatible with the theoretical framework of justice outlined in Chapter Three. As highlighted in Section 5.1, the question of the ICC's purpose was a complex and multi-faceted debate, a suggestion evidenced by the plurality of competing academic discussions concerning the Court's purposes and potential purposes as well as the range of different, sometimes even conflicting, purposes collected from interviews and speeches. As such, in order to fully cover the issue of the ICC's purpose this thesis acknowledged that the Court's objectives are perhaps best understood at three levels: the societal level, the organisational level, and the practical level.

Section 5.2 focussed on the primary objective from the societal level. Here, it was suggested that a purpose of the ICC was to act as a court of last resort. This aim derives from

the principle of complementarity which established the ICC as a back-stop or safety net intended to ensure that those most responsible for international crimes are prosecuted. However, in Section 5.2, this thesis argued that an additional objective stems from identifying the ICC as a court of last resort, which is to increase state compliance with their duty to prosecute those most responsible for committing mass atrocity crimes within their domestic legal systems. It was suggested that the creation of a permanent international criminal court had the effect of institutionalising the anti-impunity/pro-individual accountability norm and as such the ICC can be argued to elicit a norm diffusion role. This is important because it is envisioned that as the anti-impunity/pro-individual accountability norm becomes diffused, through the practice of the ICC as well as international society's engagement with it, so states will become socialised into upholding their duty to prosecute those most responsible for committing international crimes.

In terms of compatibility with principles of justice, Section 5.2 argued that this norm diffusion purpose for the ICC corresponds with the argument made in Section 3.2.2 that justice exerts a coercive power when it is embedded in social institutions. It was suggested in Section 5.2 that the creation of the ICC would begin to institutionalise the anti-impunity/pro-individual accountability norm to the extent that the normative coercive power of justice would begin to alter the natural behaviour of states. The normative coercive power of justice encourages compliance with legal and moral duties not through the threat of physical repercussions, such as sanctions or reputational costs, but through social pressures. Social pressures arise when a state views itself a member of a club, or society, and thus considers itself to be bound by the standards of behaviour promoted by said club. As such, states adhere to the desirable standards of behaviour of the society because they do not want to be viewed as a "bad international citizens" (see Orend, 2006; Dunne and Wheeler, 2004). In other words,

by institutionalising a desirable standard of behaviour, in this case no impunity for international crimes, the ICC can be said to be buttressing justice's normative coercive power of compliance which it is hoped will alter the way that states naturally respond to international crimes. In short, Section 5.2 argued that the primary societal purpose of the ICC is to act as a court of last resort, which not only exists as a safety net to domestic judicial systems but also acts as a norm diffuser which could in turn help encourage states to comply with their legal and moral duties. Put another way, an objective of the ICC is to help facilitate justice's normative coercive power of compliance that can be exerted through the institutionalisation of certain norms.

Moving on to Section 5.3, this Section discussed the main objective from the organisational level. The focus in Section 5.3 was on one of the most commonly cited purposes of the ICC: to end impunity for international crimes. However, despite its commonality of reference, Section 5.3 highlighted that the ICC's ending impunity purpose is in fact narrowed by underlying gravity thresholds. It was argued that there are two gravity thresholds, each of which help further define the ICC's ending impunity purpose: an act-based gravity threshold, which focuses the Court's attention onto the most serious violations of international criminal law; and a person-based gravity threshold, which demands that the ICC concentrate on the individuals considered to be most responsible for said violations.

Now, as highlighted in Section 5.3, this narrowing of the ICC's focus has been criticised on the basis that it perhaps complicates the Court's selection process, undermines its potential deterrent impact, and possibly even stands in opposition to the notion of equality under law. However, this thesis opposed these criticisms and defended the existence of the ICC's purposive gravity thresholds as an integral element of the Court's justice system. In

Section 5.3, this was done by acknowledging that notions of justice are not egalitarian ideals that objectively apply to all acts equally. Instead, decisions of justice always possess a degree of selectivity insofar as the principles of justice help actors define notions of right and wrong as well as assist them in choosing between competing claims to resources and entitlement; as outlined in Section 3.4.1.

For the ICC, the act-and person-based gravity thresholds discussed in Section 5.3, along with the principle of complementarity, covered in Section 6.3, can be considered as the primary decision-making criteria. Section 5.3 noted that, because the ICC has limited resources, gravity thresholds are essential to not only focus the Court's actions but also assist it in choosing between the many situations which lay claim to its resources. Furthermore, principles such as command responsibility, superior orders and the irrelevance of sovereign immunity, not only establish a custom whereby the focus of international trials is on individuals in senior, decision-making positions but also establish a narrative that purports the idea that the individuals most responsible for inciting, ordering or supporting international crimes are the ones most entitled to prosecution by the ICC. In short, Section 5.3 argued that the primary organisational purpose of the ICC is to end impunity for those most responsible for committing the most serious violations of international criminal law. In other words, the ICC's mandate is selective insofar as the Court employs gravity thresholds to help it choose where and for whom impunity should be ended.

Finally, Section 5.4 outlined the central goal at the practical level. Here, the specific focus was on the purposes of an international trial and two primary schools of thought were identified: the liberal legalist school, that view the role of international trials to establish guilt; and the legal didactic school, who consider the objective of international trials as being to

write a history of atrocities. This purposive debate, between the liberal legalists and legal didactics, was interesting for the theoretical discussion of this thesis because it perhaps reflects the broader debate, outlined in Section 3.4, regarding whether notions of justice should be measured in terms of outcomes or processes. For example, in Section 5.4, it was argued that identifying the ICC's purpose as being to establish guilt by conducting trials, as the liberal legalists do, emphasises justice in terms of outcomes, whereas, suggesting that the Court's aim is to write a history of atrocities, as the legal didactics do, can be said to prioritise justice in terms of process.

Section 5.4 noted that given prominence of the liberal legalist/legal didactics debate within the literature, somewhat surprisingly the arguments expressed by the individuals interviewed for this thesis were firmly in favour of identifying the ICC's purpose as being to establish guilt through criminal trials. Thus, on the basis of the arguments outlined in Section 5.4, it was suggested that justice at the ICC is primarily measured in terms of outcomes or the number of verdicts delivered. However, this argument was qualified in Section 5.4 by noting that although the primary focus is on outcomes, so completing trials and administering guilt, the ICC must not ignore the importance of notions of justice as process because, as argued in Section 3.4.6, only when decisions are rendered in accordance with just processes do the outcomes receive a broad degree of societal acceptance. This said, notions of justice as process here relate to issues of due process and the impartiality of proceedings, not the provision of an accurate history record which was identified as a by-product of effective criminal trials rather than an aim in itself. In short, Section 5.4 argued that the main practical purpose of the ICC is to deliver verdicts through just trials. Put another way, although the ICC's aim is to conduct trials and render justice, this must be done in accordance with fair

processes so that the outcomes are considered credible and legitimate by stakeholders and broader international society.

To summarise, Chapter Five outlined that the primary societal, organisational and practical purposes accredited to the ICC can be said to be compatible with three elements of the theoretical framework of justice outlined in Chapter Three: the normative coercive power of justice (Section 3.2.2); the inherent selectivity of notions of justice (Section 3.4.1); and the mutual dependency between notions of justice as process, outcome and virtue (Section 3.4.6). This means that it is possible to argue that the controversies surrounding the ICC have not stemmed from purposive frailties and as such any issues with the Court must relate to matters of procedure, practice or both. It should be qualified that this is not to say that the purposes outlined in Chapter Five do not perhaps create unrealistically high expectations of the ICC (see Burke-White, 2008: 54 and 59-61), just that in a theoretical sense they can be considered to be compatible with some elements of this thesis' justice framework.²⁹² This is important because notions of justice give actors and actions societal acceptance, meaning that the ICC's ability to guard itself from external criticism requires its goals to be compatible with the demands of justice.

8.3 Procedure

The framework surrounding the ICC includes a number of complex procedures designed to determine both how, where and when the Court can operate. Chapter Six sought to analyse what it considered to be the primary procedures in relation to the ICC's operation and assess their compatibility with elements of the justice framework outlined in Chapter Three. Of

²⁹² As seen by the experiences of the International Criminal Tribunal for the former Yugoslavia (ICTY), the issue of unrealistic expectations is a challenge that the International Criminal Court (ICC) and its supporters will need to address (see Orentlicher, 2010: 14; Clark, 2011: 526-527; 2009b: 467; Cameron, 2008: 56-60).

particular focus here, was the discussion from Section 3.3 which focussed on notions of procedural justice and importantly the way in which a just process can be identified. Chapter Six focussed on four of the ICC procedures: referral methods, complementarity, gravity and cooperation. These were chosen on the basis that this thesis considers them to have the most impact on the ICC's workings but because they are perhaps the most controversial.

Section 6.2 analysed the three ICC referral methods: state/self, United Nations Security Council (UNSC) and Chief Prosecutor. Section 6.2.1 focussed on state/self-referrals but the emphasis was placed on self-referrals because these were identified as the most common form of referral to the ICC. Section 6.2.1 began by noting that self-referrals have, as outlined in Section 2.3.4, been heavily criticised but it was noted that the concerns regarding self-referrals pertained to how they had been applied in practice rather than the process itself. As such, with regards to the process itself, Section 6.2.1 argued that self-referrals can be considered to be compatible with three elements of this thesis' theoretical framework of justice. First, it was suggested that the process of self-referral is compatible with the participation model of procedural justice (Section 3.3.4) because it allows states to indirectly participate in proceedings. Second, building on the defence that self-referrals can help foster further cooperation from situation states, it was argued that this could be considered compatible with the accuracy model of procedural justice (Section 3.3.2) because, if cooperation did increase as a result of self-referrals, then this added support to the ICC could help improve the accuracy of the outcomes produced. Finally, expanding on this cooperation argument further, it was noted that self-referrals were initially encouraged by Luis Moreno-Ocampo as a means for securing the required cooperation. This observation was considered to be compatible with the balancing model of procedural justice (Section 3.3.3) because it could be argued that Moreno-Ocampo's decision to encourage self-referrals is reflective of a

calculation that weighed the benefits of increased cooperation against the costs self-referrals pose to the ICC's external image.

Section 6.2.2 analysed the UNSC referral process. Section 6.2.2 begins by highlighting that throughout the ICC's existence, from discussions on its inception at the Rome Conference to today, the idea of the UNSC being able to refer situations to the Court has been controversial. However, as with self-referrals, Section 6.2.2 noted that the concerns pertaining to UNSC referrals actually relate to the practice of the Security Council rather than the referral process itself. This observation meant that it was argued in Section 6.2.2 that UNSC referrals can be considered to be compatible with four elements of this thesis' theoretical framework of justice. First, it was suggested that the UNSC referral process is compatible with the accuracy model of procedural justice (Section 3.3.2) because the Security Council has the power to refer non-state parties to the ICC for investigation, which, in theory, means that no state has *de facto* immunity from the Court's jurisdiction and as such the accuracy of attempts to administer individual criminal accountability can be increased. Second, it was argued that the decision to award the UNSC the power of referral reflects an attempt by international society to balance the perceived benefits of international prosecution of international crimes with the potential costs the pursuit of justice can cause in relation to international peace and security. As such, the UNSC referral process can perhaps be considered compatible with the balancing model of procedural justice (Section 3.3.3). Third, it was noted that the justification for awarding the UNSC the power of referral was grounded on the basis that its permanent members act as 'great responsables' and render decisions that provide mutual benefits for all members of international society. Thus, it was argued that the UNSC referral process is defensible on the basis that, in theory, the Security Council should use its power of referral to serve the interests of the weakest and most

vulnerable members of international society, considered in this context to be the victims of international crimes, by providing them with access to justice and redress mechanisms. Lastly, it was suggested that the decision of whether to sanction as ICC intervention is as much as political one as it is a legal one. As such, it was argued that enabling the UNSC to make this decision can be said to be compatible with the notion of justice that defines a just arrangement as one where decisions are made by relevant institutions; in this case, a political decision being made by the UNSC, a political institution, not the ICC, a legal institution.

Finally, Section 6.2.3 focussed on the Chief Prosecutor referral process. Section 6.2.3 begins by recalling that the idea of a Chief Prosecutor with the independent power of referral was highly controversial and opposed by many states because it represented a shift to notions of cosmopolitan justice (Section 3.2.1) which challenged the prominent role states held under notions of international justice (Section 3.2.1). Moreover, it was noted in Section 6.2.3 that states were concerned of the danger of an overzealous prosecutor. However, as with self-referrals and UNSC referrals, this concern related to the practice of the Chief Prosecutor and perhaps affirms the argument from Section 7.2.1 relating to the necessity of having a virtuous prosecutor. These observations meant that in Section 6.2.3 it was argued that the process of Chief Prosecutor referral was compatible with one element of this thesis' framework of justice: the accuracy model of procedural justice (Section 3.3.2). This was suggested because the Chief Prosecutor referral process means that situations can appear before the ICC without the need of verification from neither states nor the UNSC, which, by removing possible areas for political manipulation, could improve the accuracy of efforts to render individual criminal accountability for international crimes.

Moving on, Section 6.3 discussed the complementarity process. It was initially noted that complementarity was perhaps the most prominent process of the ICC but that, despite its heavy coverage in the literature, it still remained confusing and controversial. In attempting to further understand and analyse complementarity, Section 6.3.1 addressed the issue of why complementarity was developed. Section 6.3.1 noted that complementarity was a political compromise drawn up at the Rome Conference to lessen the perceived challenges to state sovereignty posed by the ICC. As such, in Section 6.3.1 this observation is interpreted as complementarity being illustrative of a process which sought to balance the concern of states regarding the sovereignty costs related to allowing the ICC jurisdiction with the perceived benefits of ensuring that those responsible for international crimes were prosecuted. This very cost-benefit style analysis, as highlighted in Section 6.3.1, can be said to illustrate that the rationale behind the process of complementarity is compatible with the balancing model of procedural justice (Section 3.3.3).

In contrast, Section 6.3.2 concentrated on the way in which complementarity criteria of inability and unwillingness are measured. In Section 6.3.2, it was noted that the academic literature identifies two schools of thought on this topic: one which identified prosecutions of the same individuals as sufficient; and another which claims that the conduct prosecuted must be the same. Section 6.3.2 argued that this distinction draws parallels with the broader process/outcome debate within justice theory (Section 3.4). On the one hand, considering prosecutions of the same individuals to be sufficient to meet the complementarity requirements is an example of justice defined in terms of outcomes. Whereas, if complementarity requires the same individual to be prosecuted for the same offences then the focus is on justice in terms of process. Section 6.3.2 noted that the ICC has adopted a method that favours defining justice in terms of process and thus the same individual needs

to be accused of the same offences to meet the demands of complementarity. However, building on the argument made in Section 3.4.6, Section 6.3.2 argued that the focus should instead be on outcomes on the basis that the resource limitations of the ICC and the fact that the whole essence of complementarity is premised on the idea that it should be encouraging prosecutions at the domestic level not challenging them. Moreover, the last part of Section 6.3.2 critiqued the adversarial process the ICC uses to assess complementarity challenges, arguing that a change to an inquisitorial process could be more accurate because it would enable a judge to consider all available evidence rather than just a single viewpoint.

Section 6.4 concerned gravity in terms of a process for case and situation selection, as opposed to the purposive sense discussed in Section 5.3. Section 6.4.1 concerned itself with how gravity is measured before the ICC. Here, it was identified that two methods exist: one that identified gravity in quantifiable terms, often the number of victims; and one which measured gravity in qualitative terms, so the type of crime committed or the method of how the crime was carried out. As with some of the previous discussions, Section 6.4.1 noted that this very dichotomy between gravity measured in quantitative and qualitative terms is reflective of the outcome/process division within justice theory (Section 3.4). The qualitative measure, with its focus on how the crimes were committed, can be said to identify justice in terms of process. Whereas, the quantitative measure, with its focus on the number of victims, depicts justice in terms of outcomes. Section 6.4.1 noted that the ICC uses both these methods on the basis that the context of how the crime was committed can sometimes mean the crime is severe even if the number of victims is low. In other words, and as noted in Section 6.4.1, measuring gravity in qualitative terms can give context to attempts to measure gravity in quantitative terms; which could be considered representative of the argument in

Section 3.4.6 pertaining to the mutual dependency of notions of justice as process, outcome and virtue.

Contrastingly, in Section 6.4.2, the discussion narrative and argumentation was somewhat similar to that of Section 6.2.1 pertaining to the complementarity process. It was argued that, given the ICC's well-documented resource limitations, the gravity process, which narrowed the focus of the Court onto those most responsible and the most serious violations, was a reflection of the balancing model of procedural justice (Section 3.3.3). This was because, as outlined in Section 6.4.2, the gravity thresholds of the ICC can be said to be an attempt to strike a balance between the perceived benefits of conducting international prosecutions and the financial costs of doing so.

Finally, Section 6.5 analysed the cooperation process which it was argued is vital for the ICC's effectiveness. Section 6.5.1 focussed on offering a broad understanding of the concept of cooperation in an ICC context. Initially, it was noted that much of the literature and discussion surrounding cooperation with the ICC is defined in very narrow terms which leads to an unfair assessment of engagement with the Court, focussing primarily on state cooperation in the area of arrest and surrender. In Section 6.5.1 it was argued that cooperation with the ICC can take many forms and come from many sources. As such, it was suggested that when analysing the extent to which cooperation has been forthcoming or not it is important to highlight what form of cooperation is under consideration and what stakeholders have allegedly been uncooperative. Moreover, Section 6.5.1 suggested that, in general, the ICC's cooperation process can be considered compatible with two elements of this thesis' theoretical framework of justice. First, it was argued that the broad nature of the ICC's cooperation regime created many areas for both direct and indirect stakeholder

participation, which can be considered to indicate compatibility with the participation model of procedural justice (Section 3.3.4). Second, it was argued that cooperation was compatible with the accuracy model of procedural justice (Section 3.3.2) because cooperation from stakeholders can be considered a means for overcoming some limitations in the ICC's enforcement regime which, in turn, could help improve the accuracy of efforts to end impunity for international crimes.

In contrast, Section 6.5.2 raised the idea of a cooperation paradox at the ICC whereby the mandate and design of the Court actually hinders the cooperation it can receive. In Section 6.5.2, this observation was considered to be important because it perhaps means that sometimes non-cooperation from states may not be their fault. In light of this observation it was suggested that it is important to differentiate between notions of voluntary and involuntary non-cooperation. These distinctions were again said to reflect the measurement of justice in terms of outcome or process. The ignoring of these different forms of non-compliance is an example of justice being defined in terms of outcomes, where the focus is merely on whether or not cooperation occurred. Whereas, identifying the type of non-compliance, whether voluntary or involuntary, places the emphasis on the process behind said non-compliance which is important with regards to assessing whether or not criticism is just. As such, it was argued that it is important to consider the type of non-cooperation in the analysis because understanding why the non-cooperation occurred can give context to the action. In short, Section 6.5.2 suggested that this observation helps affirm the argument made in Section 3.4.6 regarding the mutual dependency of notions of justice as process, outcome and virtue.

In sum, Chapter Six argued that the procedures that underpin the ICC's operations are, for the most part, compatible with the requirements of justice, particularly with regards to them reflecting the notions of procedural justice discussed in Section 3.3. This means that, in line with the observations made from the Literature Review in Chapter Two, the shortcomings of the ICC have been caused by the actions of its core stakeholders, many of which, as will be shown below, can be said to be incompatible with the demands of justice. Nevertheless, as alluded to in Section 6.1, this is not to say that the ICC's procedural framework is perfect and many limitations within it do exist, as highlighted above. Now, it is important to note that limitations of the procedures are not necessarily synonymous with them being unjust. But, it is important for the ICC to recognise the procedural limitations it faces and try to address them because just procedures are the means through which just outcomes, with broad credibility and legitimacy, can be produced.

8.4 Practice

The Literature Review for this thesis, found in Chapter Two, highlighted that the mainstay of criticisms levelled against the ICC were related to stakeholder practices. As such, this research sought to explore whether these practices were incompatible with the requirements of justice or merely just undesirable for a certain set of commentators. In this thesis this is done by identifying what this research considers to be the four most important stakeholders, both internal and external, in terms of the ICC's practice and then analysing their actions in accordance with the theoretical framework of justice outlined in Chapter Three. The four stakeholders discussed in this Chapter were: the OTP, the Chief Prosecutor, the states parties to the *Rome Statute*, and the UNSC. These stakeholders were identified on the basis that they exert the largest influence over the ICC's operations and thus their practice is central to the Court's perceived credibility and legitimacy.

Section 7.2 discussed the practices of the OTP and the ICC's two Chief Prosecutors, Luis Moreno-Ocampo and Fatou Bensouda. Now, although Section 7.2 was critical of the practice of both the OTP and Chief Prosecutor, it is not to say that everything these actors have done has been poor, just that some of their more controversial practices have been incompatible with the requirements of justice outlined in Chapter Three. Section 7.2.1 focussed on the practice of the OTP and argued that the Office had acted inconsistently with regards to the length of time situations spend at the Preliminary Examination stage. In Section 7.2.1, it was noted that the time the Kenyan and Ivorian situations spent under Preliminary Examination was drastically different to that of Afghanistan, Colombia, Georgia and Nigeria. At the basic level, this inconsistent practice, between situations that were contextually similar in terms of their referral type, was considered to be incompatible with the demands of justice as consistency. Furthermore, Section 7.2.1 suggested that the OTP may not have acted impartially insofar as certain situations appear to have been treated more favourably, by being allotted more time to demonstrate they are fulfilling the complementarity requirements, on the basis of geopolitical factors or whether or not they either directly involved, or were politically significant for, the great powers. This has perhaps resulted in a situation where the ICC appears to focus its attention on politically weak or insignificant situations rather than those where the most serious crimes of international concern have been committed. Building on this critique, Section 7.2.1 argued that it is debatable whether allowing geopolitical factors to influence decision-making, and thus allowing impunity to continue in politically significant situations, can be said to be acting in the interests of the weakest and most vulnerable, identified as the victims of international crimes, because they appear to be being denied access to justice and redress mechanisms at both the domestic and international level.

In contrast, Section 7.2.2 concerned itself with the practice of the two ICC Chief Prosecutors, Moreno-Ocampo and Bensouda. In Section 2.2.1, Moreno-Ocampo was identified as perhaps the most controversial person within the ICC framework from its inception. Moreover, Section 7.2.2 noted that respondents interviewed for this thesis echoed the feeling in the literature regarding Moreno-Ocampo's ability as a Prosecutor as well as his leadership style. Echoing this concern, in Section 7.2.2 it was argued that some of Moreno-Ocampo's actions could be indicative of him not acting in a manner that portrayed certain virtues, such as independence and impartiality, expected of the ICC's Chief Prosecutor. Section 7.2.2 supports this argument with the example of Moreno-Ocampo's decision to announce the opening of the Ugandan situation alongside Ugandan President Yoweri Museveni, which it was argued cast shadows over the independence and impartiality of the OTP's investigation. In other words, Section 7.2.2 suggested that Moreno-Ocampo could have been said to have acted unjustly on the basis that he failed to act in accordance with the notion of justice as individual virtue (Section 3.4.5). Conversely, Section 7.2.2 noted that Bensouda's appointment was initially welcomed and that reviews of her performance have been somewhat more favourable. However, it was noted in Section 7.2.2 that her performance can too be criticised on the grounds that she has not displayed the virtue of discretion expected of ICC Chief Prosecutors. This argument was supported in Section 7.2.2 with a case study of the OTP's interaction with Ivorian authorities over the surrender of Simone Gbagbo. It was suggested that Bensouda should have used her discretionary power, and thus displayed the virtue of discretion, and surrender jurisdiction of the Gbagbo case to Ivorian authorities who had shown both the ability and willingness to prosecute. Thus, as with Moreno-Ocampo, Section 7.2.2 argued that some of Bensouda's actions can be considered

unjust on the grounds that she failed to act in a way compatible with the demands of justice as individual virtue (Section 3.4.5).

Moving on, Section 7.3 focussed on the actions of the states parties to the *Rome Statute*. These were chosen because, in signing the *Rome Statute*, the states parties become legally obliged to cooperate fully with the ICC and comply with its decisions and requests. Moreover, it was noted that states parties interact with the ICC on two levels: collectively in the form of the Assembly of States Parties (ASP), and individually. Section 7.3 focussed on two areas, funding and arrest and surrender compliance, and argued that the practice of states parties in both these areas can be said to have been incompatible with some of the theoretical demands of justice outlined in Chapter Three.

Section 7.3.1 discussed some of the issues pertaining to funding of the ICC. Here, it was noted that some of the practices of the states parties, both collectively in the ASP and individually, could be said to have placed financial strictures onto the ICC. Section 7.3.1 provided two examples: one of which concerned the budget adoption practice of the ASP, whereby they scrutinise all requested finances in detail and often adopt a budget much smaller than the one requested; and another which outlined that certain states parties have failed to provide the ICC with the contributions they agreed to. In general, Section 7.3.1 suggested that these actions were problematic because they did not represent the states parties providing the ICC with the required levels of resource cooperation. However, more specifically it was noted that forcing financial strictures onto the ICC by reducing the budget it claims to need, as well as states not paying the contributions they have agreed to make, can be said to not be acting in the interests of the weakest and most vulnerable because it could have the impact of reducing the number of situations and cases that the Court is able

to investigate and conduct respectively. Moreover, with regards to states not providing their contributions, such actions can be said to be incompatible with the demands of legal justice because they demonstrate a failure of certain states parties to honour legal agreements that they have made.

Contrastingly, Section 7.3.2 discussed the arrest and surrender cooperation provided to the ICC by states parties. It was noted that a commonly held myth was that states had not been forthcoming in arresting and surrendering suspects to the ICC. Section 7.3.2 noted that, in general, states had been compliant with the ICC's arrest and surrender requests insofar as only a few of the ICC fugitives can be said exist as a result of, what this thesis termed in Section 6.5.2, voluntary non-compliance. Section 7.3.2 argued that perhaps the most controversial case of voluntary non-compliance involved the apprehension of one of the ICC's most high-profile indictees, Sudanese President Omar al-Bashir. Al-Bashir is the subject of two ICC arrest warrants but has continued to travel the world, including to ICC states parties that have otherwise been cooperative. Section 7.3.2 highlighted this selective cooperation as being problematic with regards to the notion of justice as impartiality on the basis that it could be argued that certain states were treating al-Bashir favourably by virtue of his position as a head of state; despite notions of sovereign immunity for those accused of international crimes being nullified by the *Rome Statute* and customary international law. Moreover, it was suggested that by failing to arrest al-Bashir certain states parties can be said to have violated the notion of legal justice on the basis that they are under a legal obligation to comply with the ICC's requests. Finally, by refusing to arrest al-Bashir certain states parties are allowing him impunity, and thus obstructing the access to justice and redress for victims, which can be considered incompatible with the demand that a just decision is one that best serves the interests of the weakest and most vulnerable (Sections 3.1.1 and 3.2.1).

Finally, Section 7.4 focused on the practice of the UNSC in relation to making referrals to the ICC and then enforcing these decisions. Section 7.4.1, using the case studies of Darfur, Libya and Syria which at the time of writing the only three ICC referrals attempted, argued that the UNSC had inconsistently practiced its power of referral. This argument was supported, and thus evidence of inconsistency shown, by comparing the Darfur, Libya and Syria situations across three areas: the process followed by the UNSC prior to the referral attempt being made; the quantitative gravity of the crimes at the time of referral; and lastly the contradictory voting justifications of the P5 in relation to the three situations. At the basic level, Section 7.4.1 argued that this inconsistent action by the UNSC can be considered incompatible with the demands of justice as consistency. However, more specifically Section 7.4.1 argued that this inconsistency can be used to suggest that UNSC has failed to act in accordance with the demands of impartiality (Section 3.4.3) on the basis that it was noted that the Syrian situation was being treated favourably by virtue of Russia and China's political allegiance with the Assad government. Moreover, it was argued that the Libyan situation was possibly referred so quickly to the ICC on the basis of an underlying prejudice shown against Muammar Gaddafi and his regime. Likewise, the inconsistency in process shown in Section 7.4.1 by comparing the approach followed prior to the referrals can be said to illustrate that the UNSC referral process does not possess the required formal process to guide its decision-making, which not only leaves it vulnerable to political manipulation but also perhaps that because outcomes are not produced through a just process then they lack a degree of societal acceptance.

In contrast, Section 7.4.2 discussed the idea that the UNSC has shown an unwillingness to follow-up on both the Darfur and Libya referrals it made. It was noted that there is no evidence suggesting that the UNSC has issued any assistance to the ICC for either the Darfur

or Libya situation, and that they have failed to respond to the number of notifications provided by the ICC regarding non-cooperation of states. This, so it was noted in Section 7.4.2, has meant that both the Darfur and Libya cases have stagnated and thus, because the victims are still being denied access to justice and redress mechanisms, it is debatable if such an action can be said to be compatible with the demands that a just decision is one that serves the interests of the weakest and most vulnerable. Moreover, this lack of follow-up action is problematic because the UNSC is an institution that could buttress the physical coercive power of justice (Section 3.2.2) by offering its vast array of political leverage tools to increase the physical costs of non-compliance with ICC requests.

To summarise, Chapter Seven argued that the practices of what this thesis considered to be the ICC's four core stakeholders can, for the most part, be considered incompatible with the demands of justice outlined in Chapter Three. Of particular concern was the extent to which the actions and decisions lacked the required consistency and impartiality to be considered just as well as how they appeared to fail to serve the interests of the weakest or most vulnerable in the transactions. The discussion in Chapter Seven was important because it reflected the observations made in the Literature Review and allowed for the development of an argument which was able to defend the ICC's purposes and procedures as being compatible with justice albeit perhaps in need of some refining or improvements. To qualify, the Chapter's primary findings do not suggest that every single practice of these stakeholders is incompatible with justice, just some of the ones most important to the functioning of the ICC as well as its credibility and legitimacy. This is important because it suggests that a mainstay of the ICC's shortcomings can perhaps be accredited to the fact that the Court has not been adequately supported by its core stakeholders. Having summarised the primary arguments offered by this thesis, in the previous three Sections, the next Section will reflect

on the research methodology and approach used within the thesis, including highlighting any issues that may surround it.

8.5 Limitations and Reflections on the Research Methodology and Approach

When conducting research it is important to acknowledge any limitations with the methodology and approach used as well as how these could be addressed in future studies. This thesis has identified three such limitations: positionality, generalisation and temporal conclusions. First, the issue of positionality takes its roots from Edward Said's orientalist argument which suggests that sometimes Western ideas and values are perceived or assumed to hold a privileged position over those from other parts of the world (see 1978;2003). As discussed in Chapter Four, being a British researcher based in a British university could be viewed as problematic because it risked allowing the cultural positionality of both the researcher and the institution to penetrate the study. There were three areas where positionality was identified as being potentially problematic for this thesis due to the cultural background of the researcher. One issue relates to the subjective manner in which notions of justice are identified, especially with regards to the central ideas and principles through which we can assess whether actions or processes are just or unjust, which may not be universally held. The second problem relates to the subjectivity of notions of morality within international society, that is to say what actions are recognised as right or wrong, which means that what this author considers to be a wrong action may be different to others, particularly if they come from a different cultural background. The final area concerns the underlying beliefs and opinions surrounding both the apparent necessity and benefits of adequate and fair criminal prosecutions. In an effort to limit the negative impacts of these observations on the study, the researcher was conscious of consulting a wide-range of

sources of literature on the topics of justice and responses to allegations of mass atrocity crimes.

However, this thesis required a justice framework to be constructed upon which three ICC related aspects could be analysed. An integral element of this framework was that it reflected the researcher's own opinions on the concept of justice, based on the literature they had reviewed. This means that the researcher had to acknowledge that a degree of positionality was to be expected because what they constituted as justice would be heavily based on their cultural upbringing. Thus, instead of trying to eradicate this element of positionality, the researcher acknowledged its existence, as well as the issues it could pose, and ensured that all claims made within the thesis were adequately qualified and supported with empirical evidence from a range of sources where possible. This said, there does remain a degree of discomfort in relation to the study being entirely focussed on one understanding of what constitutes just and unjust. For this reason, if the researcher was to design a future study on the compatibility of the ICC's action with notions of justice, then they would endeavour to conduct the research and analysis in collaboration with other individuals who held different views on what constitutes justice and/or came from a non-Western background. This is not to say that collaboration does not bring its own independent challenges, such as differing sometimes even competing or incompatible research agendas and approaches, but just that a study involving culturally sensitive issues, like justice, notions of natural morality and criminal prosecution, would benefit from a range of different perspectives so that a single cultural position is not allowed to become dominant (see Hammersley, 2011: 17).

Second, the issue regarding the potential generalisation of the study stemmed from looking at the ICC as a whole, rather than focussing on individual case studies of the situations where the Court is active. This approach can pose a challenge to generalising about the ICC's performance in any given situation. The overall conclusion of the thesis, that the actions of the core ICC stakeholders have not been compatible with the notions of justice outlined in this thesis, was drawn from an overall analysis of interactions with the ICC and not specifically focussed on one individual situation. This means that there is the potential that within a specific situation, the actions of stakeholders have been compatible with the demands of justice.

Nevertheless, the broad challenges facing the ICC and the large levels of controversy and criticisms that surround its actions perhaps suggest that the performance of the stakeholders has been more often than not incompatible with the demands of justice rather than compatible with them. Moreover, had this thesis approached the topic from a different perspective, where the focus was placed not on the ICC in general but instead on the impact that it has had on specific situations, then another issue with regards to generalisation would have existed; that where conclusions drawn from a study of a situation with specific geographic, historic and political contexts are not generalisable with other situations where the aforementioned contexts are different. In short, problems with the generalisability of studies on the ICC are somewhat unavoidable. In future studies, this limitation could be addressed by combining a general discussion on the ICC with in-depth case study analysis from one or more of the situations under Full Investigation.

Finally, conducting research on an organisation like the ICC is challenging because the Court is constantly developing and undergoing changes. International relations do not remain

stagnant and this fluctuation is perhaps intensified with regards to the relationship between states and institutions of global governance, as evidenced by events such as Brexit or South Africa and Burundi's proposed withdrawals from the ICC. This continuous evolution of the relations between international actors means that quite often analytical contributions can only ever depict a situation at a given temporal moment. For instance, hypothetically it is plausible that all the permanent members of the UNSC could undergo a transition of leadership which brought their policies on the ICC in line with one another, thus creating the potential to alter the findings of this thesis.²⁹³

In sum, the research findings of this thesis may need to be understood as being a particular representation of the events that existed at a particular time in history (see Rosenthal and Rosnow, 1991). This means that it is possible that the conclusions and observations of this thesis have both teleological and historic relevance but at the same time they could become meaningless in the future. Nonetheless, the challenges facing the ICC do not appear to be subsiding and some of them appear to be underpinned by age-old theoretical debates within international relations, such as the relevance of sovereign immunity. This means that although the thesis can be described as existing in a particular temporal context, it is likely that the findings will remain relevant in relation to discussions on the ICC for the foreseeable future. Moreover, the study remains an important contribution to the academic literature on the basis of its theoretical contribution to the field by establishing a new framework with the potential for analysing actors other than the ICC, such as the World Trade Organisation (WTO) or European Union (EU), as well as reanalysing the Court should

²⁹³ This is not to say that such a change would necessarily result in an improvement of the ICC's relationship with the United Nations Security Council (UNSC) because it is possible that the policy change unified the Security Council against the regime of international criminal justice.

some revolutionary changes occur within international society. Having outlined what this thesis considers to be the primary limitations with the research methodology and approach, it will now turn its attention to the implications of the research for the study of international relations, law and ethics as well as any potential avenues for further research.

8.6 Contributions of the Study to the Literature and Avenues for Further Research

Steven Roach argued that the ICC is a unique organisation insofar as it sits at the point where discussions on international ethics, law and politics converge (Roach, 2006). In the Introduction to this thesis, these disciplines were used to categorise the three primary arguments in support of the ICC's creation and it was seen that each school of thought offered their own interpretation as to why a permanent international criminal court was required. However, despite Roach's depiction of the ICC acting as a point of convergence between matters of international ethics, international law and international politics, the academic literature on the Court, as well as international criminal law and justice more generally, remains highly polarised and more often than not firmly within one of the three aforementioned areas of study. This is problematic because each of these areas of study have important observations to make regarding the challenges, limitations, performance and shortcomings of the ICC, some of which may fit together or even help to explain issues raised by the others, yet are rarely discussed in the same literature. A good example of this issue regards the problem of selectivity within international criminal justice which is often critiqued²⁹⁴ by scholars of international law and international relations even though, as outlined in Section 3.4.1, notions of justice cannot be anything other than selective because

²⁹⁴ This is not to say that all international law or relations scholars use this critique, for instance both Robert Cryer (see 2005a) and Chris Brown (see 2003) defend the issue of selectivity from a legalist and political standpoint respectively, but it is a common problem identified within the literature.

they are designed to help reconcile competing claims for resources and entitlement or for deciding on matters of right and wrong.

Therefore, from the observations made by this thesis it could be concluded that a greater level of collaboration between the fields of International Ethics, International Law and International Relations is required in order to gain a more rounded understanding of the issues and potential of the ICC and international criminal justice more generally. Now, a call for stronger levels of collaboration between different fields of international studies, particularly International Law and Relations, is not new (see Chimni, 2017; Beck, 2009; Dias, 2007; Finnemore, 2007; Abbott *et al*, 2000; Slaughter, Tulumello and Wood, 1998; Slaughter Burley, 1993; Abbott, 1989). However, despite these numerous efforts, any meaningful collaboration, particularly in the area of international criminal law, justice and the ICC, has not materialised.

The second implication of this study for the field of International Relations, and the study of the ICC and international criminal justice, is that justice theory is increasingly an underused source of theoretical literature. Aside from a small number of scholars discussing notions of so-called global justice (see Valentini, 2011; Lewis, 2003; Nagel, 2005; Rawls, 1999a; Beitz, 1975), there is very little International Relations literature that applies theoretical conceptions of justice in its analysis.²⁹⁵ This is important because it is not only for matters relating to international criminal justice and the ICC that these theoretical discussions could be useful. The field of social justice, outlined in Section 3.2, is dedicated to the relationship between justice and societal institutions, meaning that the principles of social

²⁹⁵ This is despite justice appearing as a prominent feature of many discussions on issues concerning international politics.

justice could, in theory, be applied to the plethora of international institutions and organisations that exist within international society. Moreover, procedural arrangements are plentiful within international society but few of these are ever analysed in accordance with the extent to which they exert or provide for notions of procedural justice. Any limitations or challenges that these international procedural arrangements face could be explained by applying Rawls' triad of procedural justice systems to their design.²⁹⁶ Finally, as discussed above, there are many conceptions and theoretical positions and understandings of justice, some of which differ greatly to the one outlined in Chapter Three.²⁹⁷ This means that there exists an entire new theoretical paradigm for analysing matters relating to International Relations to be explored, which could offer new insights into existing problems and help further our understanding of the discipline.

The last observation relates directly to the study of the ICC and international criminal justice. In the Introduction to this thesis it was suggested that few of the discussions on the ICC were balanced and that there has long been a growing trend in commentators speaking negatively about the Court's existence, performance and potential. Here, it can be useful to recall Darryl Robinson's observation that it has become almost fashionable to talk negatively about the ICC and that this negativity has penetrated the international criminal law discourse which is shaping the direction that analyses take (Robinson, 2011). This thesis attempted to address this shortcoming in the literature by being as holistic as possible in its analysis, paying homage to both the strengths and limitations of the ICC's performance and its system. Nonetheless, this thesis would argue that there is perhaps a need to be fairer when analysing

²⁹⁶ See Section 3.3.

²⁹⁷ Michael Sandel's work offers a good brief overview of the differing, mainstream theoretical positions on justice (see 2010; 2007); some of which could be applied to international relations.

the performance of the ICC and its stakeholders as they pursue international criminal justice. The academic discipline surrounding the ICC, international criminal justice and law can appear quite cyclical with sometimes the same authors repeating the same arguments but using different evidence or relating it to a different event. In short, the academic field surrounding the ICC needs to be careful that it does not institutionalise a set of criticisms regarding the Court to the extent that no matter what the ICC does it cannot escape this stigma and negative portrayal.

Moving on to areas of further research, the ICC is full of concepts and processes relevant to the field of International Relations or, as proposed above, for a collaborative study. For instance, the concepts of sovereign immunity and command responsibility appear to have competing ethical, legal and political justifications to the extent that they may be understood in different ways. It would be interesting to conduct research that attempted to analyse these two concepts from these differing viewpoints with an attempt to identify any contradictions and understand the impact that they have over the ICC's workings. Similarly, certain ICC procedures, such as victim participation and the outreach programme, are grounded in an ethical narrative that prioritises ideas of restorative justice. However, there are underlying political issues regarding who is responsible for supporting these procedures, particularly in relation to providing security for outreach officers in the field or victims when they return from participating in ICC proceedings. Furthermore, broader political complications exist with regards to the visas and funding required by victims to attend trials and with regards to outreach officers being able to utilise state mechanisms, such as the media, to help inform local populations about ICC proceedings. Finally, with regards to theoretical positions not explored by this thesis, there is space for further research in terms of assessing the relationship between certain political concepts, such as power and

governance, with the normative concept of justice that formed the basis of this thesis. For example, an analysis of the relationship between power, justice and morality, perhaps drawing on discussions by Carl Schmitt (see Schmitt, 1932;204; 1932;2007; 1922;2006) and Michel Foucault (see Foucault, 1982; 1975;1991),²⁹⁸ could shed light on the role played by both material and social global power structures, including the UNSC, in influencing our understandings and interpretations of notions of international criminal justice.

Moving on, one of the main areas discussed in the thesis but in need of further research is the interrelationship between the UNSC, the great powers and the ICC. The UNSC, and subsequently the great powers,²⁹⁹ have a privileged role within the ICC framework, meaning that their decisions, ideas and policy positions not only influence the work of the Court but also our broader understandings of notions of international criminal justice. This is particularly interesting in terms of who is responsible for pursuing justice and whose interests are being served by prosecutions. An additional relationship in need of further consideration is that between the ICC and Africa, both the states and the African Union (AU). Underpinned by allegations of neo-colonialism and even an 'African Bias', the ICC's association with Africa is perhaps the Court's most controversial and has been the subject of a great deal of discussion, as outlined in Section 2.2.3. However, much of the analysis on the Africa/ICC relationship has addressed and defined the topic narrowly, primarily defending or critiquing allegations of selectivity. Further research is required in order to explore Africa/ICC relations more broadly and attempt to ascertain where and why the conflict exists.

²⁹⁸ Including Michel Foucault's famous debate on the matter with Noam Chomsky (see 2011).

²⁹⁹ Perhaps identified in a Bullian sense as the five permanent UNSC members.

Finally, a central theoretical element of this thesis considered Aristotle's notion of justice as individual virtue.³⁰⁰ Despite a recent revival (see Ainley, 2017; Elk, 2017; Gaskarth, 2012; 2011), when compared to conceptions of ethics identified in deontological and consequentialist terms, virtue ethics remains an under researched area within International Relations. With regards to discussions on the ICC this is perhaps somewhat surprising because, as Jamie Gaskarth observed, the existence and practice of the Court is a "virtue-laden debate" (see 2012: 442). As highlighted in Sections 2.2.1 and 7.2.2, one area where virtues are prominent at the ICC is with regards to the role of Chief Prosecutor. However, despite Moreno-Ocampo's actions and tenure being subjected to much criticism, none of this discussion has focused on the virtues expected of the ICC's Chief Prosecutor or whether Moreno-Ocampo, or his successor Bensouda, have displayed them. Further research could address this gap in the literature by expanding the discussions, such as those by Gaskarth listed above, on the ICC in virtue ethics terms, with a particular focus on the role of Chief Prosecutor. Future studies may include the development of a virtue ethics framework against which Chief Prosecutors past and present could be judged.

8.7 Concluding Remarks

A core rationale for this thesis was that many controversies had been levelled against the ICC.³⁰¹ The complex and sensitive nature of the ICC's subject-matter means that its very existence as well as its performances will always be disputed and a source of controversy. Challenging this position, Payam Akhavan defended the ICC's existence by arguing that any evaluation of the Court must consider the realities that existed when there was no permanent international mechanism for pursuing accountability and justice for international crimes

³⁰⁰ See Section 3.4.5.

³⁰¹ See Chapter Two.

(Akhavan, 2013: 528). Akhavan's observation does have a degree of validity because the existence of the ICC, and its institutionalisation of the anti-impunity norm (see Engle, 2015; Sikkink, 2011; Pensky, 2008), can be considered an improvement on the previous situation where impunity for international crimes was an accepted by-product of international society's anarchic structure. However, such an observation must be qualified on the basis that the ICC, and its core stakeholders, could have done better.

Moving to the future, in order to counteract the ICC's apparent crisis of legitimacy and create an environment within which the Court can improve its credibility, its core stakeholders need to alter their practices and begin to offer the Court the support it needs to fulfil its mandate. A starting point for such improvements could be more engagement between the ICC and its stakeholders, not only those who do or are expected to support the Court (see Bohemen, 2016) but also its opponents and those most affected by its decisions, particularly victims (see Tejan-Cole, 2016b; Vilmer, 2016; Cody, Susana and Tenove, 2014). Similarly, perhaps a re-consideration or re-asserting of the ICC's original purpose, as well as an acknowledgment of its limitations and potentials, is needed as the basis for moving forward (see Ainley, 2015). Nevertheless, in order to guard the ICC from a further crisis of credibility or legitimacy, this thesis would argue that any future actions and/or decisions, by the Court or its primary stakeholders, need to be defensible within a framework of justice.

In sum, this study was guided by the following research question: to what extent are the purposes, procedures and stakeholder practice surrounding the ICC compatible with theoretical notions of justice. The answer provided by this thesis to this question is that: although the ICC's main purposes and procedures can be considered to be compatible with the theoretical demands of justice, many of the practices of the Court's core stakeholders

have not. As such, this thesis has enhanced the understanding of the controversies surrounding the ICC by acknowledging and highlighting that the primary issues facing the Court stem from the manner in which its core stakeholders have pursued international criminal justice, rather than limitations to its fundamental aims or legal framework.

Appendix A

Interview Questions

General

How would you measure the success of the ICC?

What would you measure the success of the ICC as?

What challenges does the ICC face?

How is the Court addressing these challenges?

Should the ICC be primarily a mandate or resource driven institution? How does this differ in reality?

Is, and/or was, too much expected of the ICC?

Purpose

What is the purpose of the ICC?

(If answer is organisation specific) What is the wider aim of the ICC with regard to broader international society?

Can the ICC act as a deterrent?

Are there any examples of the Court's deterrent factor?

What barriers could prevent the Court from having a deterrent effect?

Why is it important to punish/prosecute those individuals who commit international crimes?

What problems does the apparent 'impunity gap' or 'culture of impunity' pose to the international system?

How can, or has, the ICC helped to close the 'impunity gap'?

How can the criminal process pursued by the ICC buttress national reconciliation in 'post-conflict/post-atrocity' situations?

To what extent is establishing the truth a purpose of the ICC?

How effective/efficient is the ICC's criminal process at recording a historical record of what occurred within a given situation?

How does the ICC deal with the need to strike a balance between gaining successful prosecutions, or acquittals, and making an accurate history of what occurred within a given situation?

Procedure

(Domestic Analogy) Is it realistic to expect the ICC supported by an international rule of law to act in a similar way to domestic courts?

(Adversarial and Inquisitorial System - Mix) How well has this ideas translated from theory to practice?

In what ways does the ICC cooperate with states?

From your experiences, how willing are states to cooperate with the ICC?

What provisions does the ICC possess to deal with instances of non-cooperation?

In what ways does the ICC cooperate with the UN?

What is the nature of this working relationship?

Would the ICC benefit from wider cooperation from the UNSC; especially with regard to situations referred by the Council?

Has the complementarity procedure been sufficiently tested yet?

How well has the principle of complementarity transferred from theory to practice?

How efficient is the complementarity procedure at ensuring the administration of justice?

What difficulties does the Court face in identifying instances of 'inability' and 'unwillingness'?

How efficient is the trial process at allowing for the administration of justice?

Are there any problems with the trial process?

What is the Court doing to address these problems?

Why does the trial process take so long? Is this a problem?

How does the ICC define crimes in terms of gravity?

Does the Court operate using thresholds?

Practice

How is the ICC received by affected communities?

What levels of understanding exist within the affected communities regarding the role of the ICC and its limitations?

Has the ICC been unfairly selective?

(Where) Has the ICC been unfairly selective in where it has opened investigations?

(Who) Has the ICC been unfairly selective in who it has indicted? (One side not the other?)

(What) Has the ICC been unfairly selective in what acts it has indicted individuals for?

Is the ICC bias towards Africa?

What problems does the alleged 'African Bias' create for the Court?

How is the Court attempting to counter these allegations?

Appendix B

Research Information Sheet

Outline of Study

The study involves an investigation into the effectiveness of the International Criminal Court (ICC). In particular, it seeks to explore the extent to which three areas of the ICC's structure and workings, purposes, procedures and stakeholder practices, are compatible with theoretical demands of justice. At the time of inception the Court was greeted with much enthusiasm with the Ecuadorian delegation to the Rome Conference even arguing that by developing the ICC the international community were, in part, agreeing to 'replace the rule of force with the rule of law'. However, the Court's practice and performance during its first ten years has been questionable and recent International Relations literature has been somewhat less favourable to the ICC. The research is aiming to respond to this rise in critical literature by asking: to what extent are the purposes, procedures and stakeholder practices surrounding the International Criminal Court (ICC) compatible with theoretical notions of justice? This will be achieved by asking a cross-section of relevant stakeholders about their experiences and opinions surrounding the ICC's practice and performance. The author would like to use any data gathered as evidence in their thesis and perhaps for publication in academic journals.

The Interview Process

I have written to request an interview with you on the topic of the International Criminal Court (ICC). The interview would be recorded, last *circa* one hour, and be conducted at a time and location of your choice. The interview, and interviewer, would strictly follow Plymouth University's ethical guidelines for human participant research (these can be viewed via this [link](#) or sent in the post). However, I must stress that as the research participant at any time during the interview process you hold the right to withdraw any section of or the interview in its entirety. Following the interview you would be forwarded a copy of the transcript for personal vetting and any data collected would be held safely and with the upmost confidentiality.

Contact Details

Benjamin Nutt, Room 510, Cookworthy Building, Plymouth University, Drakes Circus, PL4 8AA

Email – benjamin.nutt@plymouth.ac.uk

Telephone - 07795270607

Appendix C

Consent Form

Consent Form

The study involves an investigation into the effectiveness of the International Criminal Court (ICC). In particular, it seeks to explore the extent to which three areas of the ICC's structure and workings, purposes, procedures and stakeholder practices, are compatible with theoretical demands of justice. At the time of inception the Court was greeted with much enthusiasm with the Basotho delegation to the Rome Conference even arguing that by developing the ICC the international community were, in part, agreeing to 'replace the rule of force with the rule of law'. However, the Court's practice and performance during its first ten years has been questionable and recent International Relations literature has been somewhat less favourable to the ICC. The research is aiming to respond to this rise in critical literature by asking: to what extent are the purposes, procedures and stakeholder practices surrounding the International Criminal Court (ICC) compatible with theoretical notions of justice? This will be achieved by asking a cross-section of relevant stakeholders about their experiences and opinions surrounding the ICC's practice and performance. The author would like to use any data gathered as evidence in their thesis and perhaps for publication in academic journals.

*Please
delete as
appropriate*

Are you happy that the nature of the study and its purpose has been explained to you?
Yes / No

Are you aware that a transcript will be forwarded to you to revise your comments, if necessary?
Yes / No

Do you understand that the interview will be recorded? Yes / No

Are you happy to be named in the transcript, and in quotations? Yes / No

With regard to your use of the material, after you have reviewed the transcript, which of the following applies to you:

- The data may be used freely in any publications without further notice
Yes / No
- I would like to review all quotations from the interview before publication
Yes/ No

Do you agree to take part in this study? Yes / No

Signed (Participant):..... Date:.....

Signed (Interviewer):..... Date:.....

Appendix D

Ethical Approval

Prior to the start of data collection, the researcher gained ethical approval from Plymouth University's Business School's Ethics Committee. The nature of the research being conducted did not really pose an issue in terms of ethics insofar as there was no element of deception and the participants were not classed as vulnerable. Overall (please see letter attached to this Appendix), the Ethics Committee were satisfied that the research complied with Plymouth University's standards for research involving human participants. However, they were concerned about the practicalities regarding the strict vetting process proposed and suggested that a less strenuous one be the norm with the opportunity to opt in to the stricter version available to participants. This meant that an additional two questions were added to the interview consent form regarding whether they wanted to see a copy of the transcript and whether they wanted to see a copy of the manuscript where they were quoted. Nearly all respondents requested a copy of the transcript but few wanted to also see the manuscript. Moreover, the committee reminded the researcher that the protection from harm procedures and considerations expand to the researcher as well as the participants. This was something that the researcher had not considered when completing the form but did take into consideration with regards to the location and time of interviews.

Benjamin Nutt
PGR Student
Plymouth Business School

Ref: PBS.UPC/FREAC/FREAC1213.26/clc
Date: 11 April, 2013

Dear Ben

Ethical Approval Application No: FREAC1213.26
Title: The International Criminal Court: Legal Guardian or Political Tool

The Faculty Research Ethical Approval Committee has considered the ethical approval form and is fully satisfied that the project complies with the University of Plymouth's ethical standards for research involving human participants.

However, please note the following recommendations:

1. You might want to consider the practicality of conducting the 'vetting process' including 'the acceptance of the context' with every participant. Instead it could be limited to those who actively ask for it.
2. In section 6d while there is adequate consideration placed on the protection from harm for the interviewees, the same should also be applied to the interviewer. The interviewer too should feel safe when agreeing to conduct interviews. The time and place should be suitable to you too. This is particularly true for lone researchers. It might also be a good practice to keep a peer/friend informed about the interviewer's/ your whereabouts.

Approval is for the duration of the project. However, please resubmit your application to the committee if the information provided in the form alters or is likely to alter significantly.

We would like to wish you good luck with your research project.

Yours sincerely

(Sent as email attachment)

Dr Syamantak Bhattacharya
Chair
Faculty Research Ethics Approval Committee
Plymouth Business School

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Appendix E

Budget Evidence

The way in which the ASP's budget adoption practice could be said to be placing financial strictures onto the ICC relates to the willingness shown by the ASP to make alterations, sometimes even large alterations, to the budget proposed by the Court. From Table E.1, which details both the proposed and adopted budgets of the ICC since its inception in 2002, it can be seen that the budget approved by the ASP is often lower than the one initially proposed by the ICC. For example, the approved budget for 2017 of €144,587,300 was €5,650,700, or 3.8%, less than the amount proposed by the ICC of €150,238,000. However, it can also be seen in Table E.1, that the amendments made in 2017 were considerably less than those made in 2016 when the approved budget of €139,590,600 was €13,729,400, or 9%, less than the proposed budget of €153,320,000. More generally, of the 14 budgets adopted using this proposal/acceptance method,³⁰² only once, for the 2010 budget, has the adopted budget been higher than the proposed budget. Furthermore, only twice, for the 2009 and 2010 budgets, have the adoption and proposal figures been within 2% of one another. In fact, since the 2004 budget, the first to be negotiated, the ASP have made alterations to the ICC's proposals by a total of €63,862,954, which equates to an average reduction of €4,912,535, or 4.1%, per budget. These reductions are primarily absorbed by the OTP and Registry, 88% in 2016 (see ICC, 2015d; 2015e) and 75% in 2017 (see ICC, 2016g; 2016h), which is unfortunate because these are perhaps the areas that will impact most negatively on the number and

³⁰² The 2002 and 2003 budgets were negotiated from the outset and not the product of the proposal/acceptance method.

Table E.1 - Table Showing the Difference between the Proposed and Approved Budgets for the ICC³⁰³

Year	Proposed Budget (in Euros)	Approved Budget (in Euros)	Difference between Proposed and Approved (Percentage Change)
2002	N/A	7,723,375	N/A
2003	N/A	23,170,125	N/A
2004	55,089,100	53,071,846	- 2,017,254 (- 3.7%)
2005	69,564,000	66,784,200	- 2,779,800 (- 4.0%)
2006	82,460,000	80,417,200	- 2,042,800 (- 2.5%)
2007	93,460,000	88,871,800	- 4,588,200 (- 4.9%)
2008	97,570,000	90,382,100	- 7,187,900 (- 7.4%)
2009	102,630,000	101,229,900	- 1,400,100 (- 1.4%)
2010	102,980,100	103,623,300	+ 643,200 (+ 0.6%)
2011	107,020,000	103,607,900	- 3,412,100 (- 3.2%)
2012	117,730,000	108,800,000	- 8,930,000 (- 7.6%)
2013	118,750,000	115,120,300	- 3,629,700 (- 3.1%)
2014	126,070,000	121,656,200	- 4,413,800 (- 3.5%)
2015	135,390,000	130,665,600	- 4,724,400 (- 3.5%)
2016	153,320,000	139,590,600	- 13,729,400 (- 9.0%)
2017	150,238,000	144,587,300	- 5,650,700 (- 3.8%)
Totals	1,543,164,700	1,479,301,746	- 63,862,954 (- 4.1%)
Average Difference	N/A	N/A	- 4,912,535 (4.1%)

(Sourced: ICC, 2017b; 2017c)

quality of investigations conducted by the OTP as well as the amount of victim and/or outreach programmes organised by the Registrar.³⁰⁴

³⁰³ Data correct as of August 2017.

³⁰⁴ Although, it is not shown where the reductions in the Registry's budget are felt, it is plausible to assume that optional, albeit desirable, programmes, such as those focussing on outreach or victims, would perhaps be where the cuts would be made.

In short, from the figures provided in Table E.1 and outlined above, it could be argued that the concerns raised by the interview respondents, regarding the ASP's budget adoption practice, are perhaps valid insofar as on average the ASP has adopted a budget that is almost 5 million euros lower than the one proposed by the ICC; thus possibly forcing the Court to operate with extremely tight finances. Now, it should be said that whether or not the practice of the ASP, in heavily scrutinising and amending the ICC's proposed budget, is placing financial strictures onto the Court is perhaps a matter of opinion. But, in the *Proposed Programme Budget for 2017 of the International Criminal Court*, published by the ICC's Registry on 17 August 2016, it was claimed that the proposed budget was "based on a genuine and realistic assessment of the Court's needs for 2017" (see ICC, 2016h: 7). So, if one takes the ICC's words at face value, and believes that the proposal submitted by the Court in 2016, as well as those it has submitted previously, are in fact "genuine and realistic assessment[s]" of its requirements, then the ASP's decisions to lower the moneys awarded to the ICC could be said to be evidence of the states placing financial strictures onto the Court.

Moving on to the second issue, there is evidence to suggest that certain individual states parties have not been willing to uphold their stated contributions. For instance, the *Report of the Committee on Budget and Finance on the Work of its Twenty-Seventh Session*, published on 28 October 2016, outlined that in September 2016 the ICC had yet to receive €18,207,305, or 13%, of that year's budget contributions. In fact, of the ICC's 123 member states just under half, 43% or 53 states,³⁰⁵ had outstanding contributions to be paid for the

³⁰⁵ Afghanistan, Antigua and Barbuda, Argentina, Benin, Brazil, Burkina Faso, Burundi, Cape Verde, Central African Republic (CAR), Chad, Colombia, Comoros, Congo, Cook Islands, Costa Rica, Democratic Republic of Congo (DRC), Djibouti, Dominica, Dominican Republic, El Salvador, Gabon, Gambia, Ghana, Guinea, Honduras, Jordan, Lesotho, Liberia, Macedonia, Malawi, Maldives, Mali, Marshall Islands, Mexico, Mongolia, Niger, Nigeria, Panama, Paraguay, Peru, Senegal, St Vincent and Grenadines, Suriname, Tajikistan, Tanzania, Timor Leste, Trinidad and Tobago, Uganda, Uruguay, Vanuatu, Venezuela, and Zambia.

2016 budget (see ICC, 2016i: 35-37). This said, 91% of these outstanding contributions from September 2016, a total of €16,652,646, were owed by just five states: Brazil, €9,130,333; Mexico €3,302,902; Argentina, €2,084,682; Venezuela, €1,378,810; and Colombia, €753,920. Furthermore, this report was published in September 2016 meaning that states still had a further four months to fulfil their agreed contributions, which many of them may have done. However, where this concern becomes more problematic is when it is noted that 29³⁰⁶ of the ICC's states parties are in arrears, meaning that they have not fulfilled their agreed contribution for more than one budget cycle, with ten states having not made a contribution for at least five years (see ICC, 2016i: 35-37).³⁰⁷ In total, these 29 states are €30,120,505 in arrears on their contribution payments, but 91% of this figure, €27,455,026, is accounted for by just three states: Brazil, €20,543,704; Venezuela, €4,761,746; and Argentina, €2,149,576 (see ICC, 2016i: 35-37). Thus, it could be argued that these figures suggest that a number of states are failing to provide the ICC with the levels of resource cooperation it requires and subsequently forcing the financial strictures onto the Court.

However, when the broader picture of the ICC's budget deficit is taken into consideration, the issue does not appear quite so severe. In total, only €34,163,902, or 2.5%, of the ICC's entire 15 year budget, including the figures for 2017, remains unpaid (see ICC, 2016i: 35-37). Moreover, Fadi El-Abdallah, the ICC's Spokesperson, appeared unconcerned with the ICC's financial state in 2015, arguing that: "the ASP has also established a contingency fund of 7 million euros to allow the Court to handle any unforeseen increase in workload, for

³⁰⁶ Antigua and Barbuda, Argentina, Benin, Brazil, Cape Verde, CAR, Chad, Colombia, Comoros, Congo, Djibouti, Dominica, Dominican Republic, Gabon, Guinea, Macedonia, Malawi, Maldives, Marshall Islands, Niger, Nigeria, Paraguay, Suriname, Tanzania, Uganda, Vanuatu, and Venezuela.

³⁰⁷ Benin, Uganda and Venezuela made their last contributions in 2012, Congo and Malawi in 2011, Tanzania in 2010, Niger in 2009, and perhaps most worryingly Comoros and Vanuatu have never made a single contribution despite being states parties since 2006 and 2012 respectively. Additionally, El Salvador were recorded as having not made a payment but they only became a state party in 2016.

example, the opening of a new investigation”, which can be used to help alleviate any financial concerns (as cited in van Leeuwen, 2015). But, it is important to note that the ICC’s contingency fund is designed to be used to accommodate unforeseen circumstances, such as new investigations, not to replace unpaid contributions (see ICC, 2004b: 8-9). This means that if the ICC is forced to use its contingency fund to supplement unpaid contributions then it will be placed under further financial limitations and possible even unable to act effectively if a new, unforeseen situation arises where it is needed. Moreover, in its aforementioned October 2016 report, the Committee on Budget and Finance, for the first time ever, commented specifically on the issue of unpaid contributions from states parties:

the Committee stresse[s] the importance of contributions being paid in full and in a timely manner. Not meeting obligations in relation to the payment of contributions may seriously jeopardize the daily operations of the Court. If contributions remain unpaid at the end of the year, the Court may need to resort to the WCF [Working Capital Fund], while the total may not be sufficient to cater for liquidity shortfalls (see ICC, 2016i: 8).

If this current practice continues, or worse more of the outstanding contributions become owed in arrears, then a situation could arise where the ICC only physically possesses *circa* 85% money it was promised. Therefore, as with the budget adoption practice of the ASP, it could be argued that the failure, or worse refusal, of states parties to provide the ICC with the contributions they promised can be said to be placing unnecessary financial strictures onto the Court

Appendix F

Table F.1 - Table Showing all ICC Indictées

Situation	Name	Arrest Warrant or Summons	Date Issued	Status
Democratic Republic of Congo	Thomas Lubanga	Arrest Warrant	10 February 2006	Actioned
	Bosco Ntaganda	Arrest Warrant	22 August 2006 13 July 2012	Actioned
	Germain Katanga	Arrest Warrant	2 July 2007	Actioned
	Mathieu Ngudjolo	Arrest Warrant	6 July 2007	Actioned
	Callixte Mabarushimana	Arrest Warrant	28 September 2010	Actioned
	Sylvestre Mudacumura	Arrest Warrant	13 July 2012	Fugitive
Uganda	Joseph Kony	Arrest Warrant	8 July 2005	Fugitive
	Okot Odhiambo	Arrest Warrant	8 July 2005	Suspect Dead
	Raska Lukwiya	Arrest Warrant	8 July 2005	Suspect Dead
	Vincent Otti	Arrest Warrant	8 July 2005	Fugitive
	Dominic Ongwen	Arrest Warrant	8 July 2005	Actioned
Central African Republic I	Jean-Pierre Bemba	Arrest Warrant	23 May 2008 10 June 2008	Actioned
	Aimé Kilolo Musampa	Arrest Warrant	20 November 2013	Actioned
	Fidèle Babala Wandu	Arrest Warrant	20 November 2013	Actioned
	Jean-Jacques Mangenda Kabongo	Arrest Warrant	20 November 2013	Actioned
	Barcisse Arido	Arrest Warrant	20 November 2013	Actioned
Darfur	Ahmed Haroun	Arrest Warrant	27 April 2007	Fugitive
	Ali Kushayb	Arrest Warrant	27 April 2007	Fugitive
	Omar al-Bashir	Arrest Warrant	4 March 2009 12 July 2010	Fugitive
	Bahr Idriss Abu Garda	Summons	7 May 2009	Actioned
	Abdallah Banda	Arrest Warrant	11 September 2014	Fugitive
	Saleh Jerbo	Summons	27 August 2009	Suspect Dead
	Abdel Raheem Hussein	Arrest Warrant	1 March 2012	Fugitive
Kenya	William Ruto	Summons	8 March 2011	Actioned
	Joshua Sang	Summons	8 March 2011	Actioned
	Henry Kosgey	Summons	8 March 2011	Actioned
	Francis Muthaura	Summons	8 March 2011	Actioned
	Uhuru Kenyatta	Summons	8 March 2011	Actioned
	Mohammed Hussein Ali	Summons	8 March 2011	Actioned
	Walter Barasa	Arrest Warrant	2 August 2013	Fugitive
	Paul Gicheru	Arrest Warrant	10 March 2015	Domestic Custody
	Philip Kipkoech Bett	Arrest Warrant	10 March 2015	Domestic Custody
Libya	Muammar Gaddafi	Arrest Warrant	27 June 2011	Suspect Dead
	Saif al-Islam Gaddafi	Arrest Warrant	27 June 2011	Fugitive
	Abdullah Senussi	Arrest Warrant	27 June 2011	Case Transferred
	Al-Tuhamy Mohamed Khaled	Arrest Warrant	18 April 2013	Fugitive
	Mahmoud al-Werfalli	Arrest Warrant	15 August 2017	Fugitive
Côte d'Ivoire	Laurent Gbagbo	Arrest Warrant	23 November 2011	Actioned
	Charles Blé Goudé	Arrest Warrant	21 December 2011	Actioned
	Simone Gbagbo	Arrest Warrant	29 February 2012	Domestic Custody
Mali	Ahmad al-Mahdi	Arrest Warrant	18 September 2015	Actioned

(Sourced: ICC, 2017a)

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